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Supreme Court, U.S.
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08-382 JUL 18 2008

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No. _____

In THE
Supreme Court of the United States

OMAR R. OSAHAR,

Petitioner,

v.

POSTMASTER GENERAL OF U.S.POSTAL SERVICE, UNITED STATES OF AMERICA, ATTORNEY GENERAL,

Respondent.

On Petition For A Writ Of Certiorari
From The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OMAR OSAHAR, Pro Se
10941 S.W. 143 Terrace
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305-253-0204
September 15, 2008
Petitioner

QUESTIONS PRESENTED

1. Whether the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, that there is no issue of genuine material fact is in direct conflict with Trans World Airlines, Inc. v. Thurston, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed 2d 523, 525 (1985); Hishon v King & Spalding, 467 US 69, 81 L Ed 2d 59, 104 S Ct 2229 (1984) and Civil Rights § 78.

2. Whether the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, that the employees in petitioner case are not "similarly situated employees" is in direct conflict with § 1620.18 of 29 CFR Ch. XIV which States in § 1620.18 (a): ""similar working conditions" encompasses two subfactors: "surroundings" and "hazards."" and in (b) "*Determining similarity of working conditions.* Generally, employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar working conditions. " §1620.14 –§1620.18 which holds that The Four Statutory Elements of Equality are (1) Skill, (2) Effort, (3) Responsibility and (4) Working Conditions.

3. Whether the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, is in direct conflict with the 2nd Circuit and 6th Circuit which uses the test of "all material respects" to compare similarly situated employees in

Title VII cases. (See Graham v. Long Island Rail Road 230 F.3d 34 (2nd Cir. 2000), is in conflict with the District Court's **"employees are similarity situated in all relevant respects ""**. (Also see pages 37-38 of DE 158 of Case 1:04-CV-22267).

4. Whether the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, is in direct conflict with the 2nd Circuit and 6th Circuit which holds: "whether two employees are similarly situated....presents a question of fact for the jury." (See Graham v. Long Island Rail Road 230 F.3d 34 (2nd Cir. 2000).

5. Whether the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, is in direct conflict with "Notice Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination, 69 Fed. Reg 67246 (November 16, 2004)" which states: "This standard defines "similarly situated" employees as those that are "similar with respect to the work they perform, their responsibility level, and the skills and qualifications involved in their positions." [67251]".

6. Whether the opinion on adverse action and/or retaliation by the District Court on page 27 of DE # 158 that **" In Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 760-61 (1998), a Title VII sex discrimination case, the Supreme Court defined an adverse employment action as a significant change in employment status, such**

as hiring, firing, failing to promote reassignment with significantly different responsibilities, or a decision causing a significant change in benefits—an action which in most cases inflicts direct economic harm.". And the Court of Appeals for the 11th Circuit in this case as stated as stated in Appeal # 06-15613, is in direct conflict with Burlington Northern & Santa Fe Ry. v. White, __U.S.__, 126 S.Ct. 24005 (2006) and Title VII (42 USCS § 2000e-2 (d)).

7. Whether the petitioner was denied Equal protection of the law pursuant to Fifth Amendment of Constitution in the application of seniority in the denial of three training courses as stated in the record of this case.

8. Does the petitioner have a "property" interest in seniority, as used in the selection for training process of Article 38.6.A.1 of the Collective Bargaining Agreement between the APWU and the USPS for Electronic Technicians Level 11 safeguarded by procedural due process in the protection afforded him by **Article 38.3.J, Seniority for Breaking Ties and Article 38.3.B Coverage states "This seniority Section applies to all regular work force Maintenance Craft employee when it is necessary for filling vacant assignment and for other purposes." pursuant to The Equal protection of the law clause of the Fifth Amendment of the Constitution.**

9. Whether the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, that "Osahar may not maintain any constitutional tort action in connection with his employment discrimination claims" is in direct conflict with the Equal Protection of the Law Clause of the 5th amendment.

10. Whether the reasoning of the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, dismissal pursuant to FRCP 56 for summary judgment in favor of the USPS, is in direct conflict with the Second, Fourth, Fifth Seventh and Eighth Circuits as held in Gallo v Prudential Residential Servs., Ltd. Partnership (1994, CA2 NY) 22 F3d 1219, 64 BNA FEP Cas 950, 64 CCH EPD ¶ 42998[courts should be reluctant to grant summary judgment in cases alleging employment discrimination, when intent of employer is at issue]; Rosen v Thornburgh (1991, CA2 NY) 928 F2d 528, 55 BNA FEP Cas 580, 56 CCH EPD ¶ 40633 [summary judgment is generally inappropriate in Title VII cases where defendant's state of mind and intent are at issue].

11. Whether the reasoning of the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, in their determination that there is no issue of genuine material fact by denying the petitioner three training courses and overtime is in direct conflict with Holified v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997) and FRCP Rule 56.

12. Whether the reasoning of the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, in their determination not to consider Appellant's disparate impact claim is in direct conflict with Holified v. Reno, 115 F.3d 1555,

1561 (11th Cir. 1997); McDonnell Douglas Corp. v. Green, 411 U.S.792, 93 S. Ct. 1817 (1973) and FRCP Rule 56.

13. Whether the 11th Circuit Courts decision amounted to an endorsement of an impermissible collateral attack on the courts previous judgment in Case No. 84-1782-CIV-ARONOVITZ and Case No. 95-753-CIV-LENARD .

14. Whether the reasoning of the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, is in direct conflict the Third Circuit which held that the nonmoving party must either present specific facts showing there is a genuine issue of material fact for trial or, if there is no genuine issue of material fact, show that there is an unresolved issue of law that precludes entry of judgment for the movant pursuant to FRCP 56(c) (See United States v One Parcel of Property Located at Shelly's Riverside Heights Lot X (1994, MD Pa) 859 F Supp 150)).

15 . Whether the reasoning of the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, is in direct conflict that

McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination as cited in Trans World Airlines, Inc. v. Thurston, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed 2d 528 (1985).

PARTIES TO THE PROCEEDINNGS & CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the Caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Omar R. Osahar, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the 11th Circuit entered in this Case # 06-15613HH on January 15, 2008, [Not Publish]. The petition for rehearing filed by the Appellant for case 06-15613-HH. (District Case No. 04-22267) was denied on April 21, 2008. District Court ORDER GRANTING DEFENDANT'S MOTION DISMISSAL ,FINAL JUDGMENT and Report and Recommendation by Magistrate Judge.

OPINIONS AND ORDERS BELOW

The decision of the Court of Appeals[Appeals Court decision was not publish] is set out at APP-1 to APP-45, of the appendix, affirming the District Court ORDER GRANTING DEFENDANT'S MOTION DISMISSAL APP. 48 to APP. 50 and GRANTING FINAL JUDGMENT at APP.46 to APP.47.Report and Recommendation by Magistrate Judge set out at APP. 51to APP. 108. The Appeal Court denial of rehearing on April 21, 2008 is set forth at APP.109 to APP. 110 of the Appendix.

II. JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). 28 U.S.C. § 2403 (a) may be applicable since constitutionality of an Act of Congress may be at issue as it may deprive federal

employees of liberty and equal protection of the law.

STATURORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964 as Amended; 42 U.S.C. § 2000e, et seq, § 701 et Seq., **§§ 1981 and 1983; 39 [U.S.C.] Labor Relations Act, Title III; § 301, 29 [U.S.C.]§ 185; . § 1620.14 - §1620.18 (See 29 CFR Ch. XIV (7-1-98 Edition) and (1987 Edition)); Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999 (1971); The 5th and 14th Amendment of the Constitution of the United States and Article 38.6.A.1 of the Collective Bargaining Agreement between the American Postal Workers Union and the United States Postal Service.**

STATEMENT OF CASE

This case concerns discrimination against the petitioner by the denial of three training courses that when posted did not require TMS training and for lost of overtime to Petitioner Omar Osahar, African-American, Electronic Technicians Level 11, as a result of the USPS not using seniority in the selection process by doling out training in a discriminatory pattern and arbitrary and capricious pattern.

(See DE 76 page 82-115 of Case# 1: 04-cv-22267).

The Collective Bargaining Agreement between the USPS and the APWU (Contract) (See DE 20 pages 11-29 of Case# 1: 04-cv-22267) Article 38.3.B Coverage states:

> **"This seniority Section applies to all regular work force Maintenance Craft employee when it is necessary for filling vacant assignment and for other purposes.".**

The context of this case parallels that of Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed 2d 523 (1985), were the Court held that not allowing the senior pilots to "bump" downward to a flight engineer discriminated on the basis of age pursuant to Title VII.

The petitioner contends that seniority is a "property interest" of employment. This case therefore, also parallels that of Board of Regents v. Roth, 408 U.S. 564 were the Court held, that "property interest protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money".

Petitioner, Omar R. Osahar (African-American) contends denial of the three training courses and overtime is a result of discrimination or

discriminatory impact and retaliation which the petitioner claims is an adverse action which is an issue of material fact The petition contends that this action violates Title VII, The equal protection

clause of the law and due process clause of the 5th Amendment of the Constitution.

In Trans World Airlines, Inc. v. Thurston, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed 2d 523, 525, 527, 533 (1985), the Court held:

"The rule that a benefit that is part and parcel of an employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free not to provide the benefit at all.... " * "nevertheless, if it does grant some disqualified captains the "privilege" of "bumping" less senior flight engineers, it may not deny the opportunity to others because of their age.". (also See** Hishon v King & Spalding, 467 US 69, 81 L Ed 2d 59, 104 S Ct 2229 (1984) and Civil Rights § 78**).**

DIRECT EVIDENCE

In is undisputed that the record has shown the petitioner has presented direct evidence of a past or present prejudice toward plaintiff or members of plaintiff's class which is evidence of pretext. (See footnote 12 in DE 158; also see § 5.40, page 338 in

Employment Discrimination Law by Mack A.Player, Hornbook Series (1988)).

The Court has held that **"McDonnell Douglas test is inapplicable where the plaintiff**

presents direct evidence of discrimination" as cited in Trans World Airlines, Inc. v. Thurston, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed 2d 528 (1985); (See Teamsters v United States, 431 US 324, 358, n 44, 52 L Ed 2d 396, 97 S Ct 1843 (1977)).

The Court has in Lee v. Washington County Bd. Of Ed held that "Proof of and immediate past history of racial discrimination alone can be sufficient to shift to local board of education the burden of justifying its employment decisions by clear and convincing evidence;" Lee v. Washington County Bd. Of Ed, 625 F.2d 1235 (1980).

In the Collective Bargaining Agreements between American Postal Workers Union, AFL-CIO and U.S. Postal Service for November 21, 1994-November 20, 2006 (See DE 20 pages 11-29 of Case # 1:cv-04-22267):

Article 38.5.A.3 states: "Newly established or vacant duty assignments shall be filled by senior employees on the appropriate preferred assignment registers."

Article 38.3.J, Seniority for Breaking Ties states "When it is necessary to determine the seniority ranking for two or more employees who are reassigned or promoted to vacancies in the same occupational group and level in the Maintenance Craft on the same

day, the following shall be used to break any tie that might exist:

1. Total Maintenance Craft career service in the installation
2. Total Maintenance Craft career service
3. Total Maintenance Craft Service
4. Total Postal Career Service
5. Total Postal Service
6. Total Federal Career Civilian Service
7. Numerical by the last 3 or more numbers (using enough numbers To break the tie, but not fewer than 3 numbers) of the employee's Social security number, from the lowest to highest."

Article 38.3.B Coverage states "This seniority Section applies to all regular work force Maintenance Craft employee when it is necessary for filling vacant assignment and for other purposes."

Article 38.6.A.1 Maintenance Training states "All Maintenance Craft job training opportunities in levels 1 through 7, will be

offered first to the senior qualified volunteer within the occupational group, level and tour where the need for the skills exists.

For Maintenance Craft job training in levels 8, 9, and 10 the employee selected will be chosen from among volunteers within the occupational group, level, and tour where the need for the skills exist. The Employer may choose not to select a volunteer who has attended training for 6 or more weeks during the previous 12 months." (See DE 20 pages 11-29 of Case 1: 04-cv-22267).

Article 8, Section 5 of the Collective Bargaining Agreement , which states **"When needed, overtime work for regular full-time employees shall be scheduled among qualified employees doing similar work in the work location where the employees regularly work in accordance with the following:**

A. Two weeks prior to the start of each calendar quarter, full-time regular employees desiring to work overtime during that quarter shall place their names on an "Overtime Desired" list.

B. Lists will be established by craft, section, or tour in accordance with Article 30, Local Implementation.

C. 1.a. When during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected in order of their seniority on a rotating basis.

b. Those absent or on leave shall be passed over. D. If the voluntary "Overtime Desired" list does not provide sufficient qualified people, qualified full-time regular employees not on the list may be required to work overtime on a rotating basis with the first opportunity assigned to the junior employee."

Seniority

In § 703 (h) of Title VII of the Civil Rights Act of 1964 requires that any differences in treatment not be "the result of an intention to discriminate because of race ***(See Quarles v. Philip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968)).

In California Brewers Ass'n v. Bryant, 444 U.S. 98, 100 S.Ct. 814, 63 L. Ed. 2d 55 (1980) the Court concluded that "seniority" criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase.

In Franks v. Bowman Transp. Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed2d 444 (1976) the Court held that Under Title VII a victim of illegal discrimination must be awarded seniority from the point of the illegal denial of the job.

ADVERSE ACTIONS

Employer treated similarly situated

employees outside his class more favorably

The 11th Circuit held in Appeal # 06-15613 on page 18 that: **"... in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973). The first step is to establish a prima facie case of racial discrimination, which a plaintiff may do by showing that:**

(1) he belongs to a protected class; (2) he was qualified to do the job; (3) he was subjected to adverse employment action; and (4) his employer treated similarly situated employees outside his class more favorably.
See knight v. Baptist Hosp. of Miami. Inc., 330 F.3d 1313, 1316 (11th Cir. 2003) (per curiam).".
In knight v. Baptist Hosp. of Miami. Inc, the

Court held that: **"To show that employees are similarly situated, the plaintiff must show that the "employees are similarity situated in all relevant respects ""**. (Also see pages 37-38 of DE 158 of Case 1:04-CV-22267).

The District Court stated on page 37 of DE 158: **"These persons are not similarly situated based upon their experience or work assignments."**

The District Court stated o page 38 of DE 158: " there is no evidence that Osahar's assignment to BDS was an adverse employment action as this assignment did not affect his seniority". Seniority was not used in this forced BDS training in violation

to the Contract.

The petitioner contends that pursuant to Title VII (42 USCS§ 2000e-2) §d, training and § h for seniority, denial of the use of seniority in the selection process for training, is an affect on seniority.

This reasoning of the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, is in direct conflict with § 1620.18 of 29 CFR Ch. XIV which States in: § 1620.18 (a) ""similar working conditions" encompasses two subfactors: "surroundings" and "hazards."" and in (b) "*Determining similarity of working conditions.* Generally, employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar working conditions.".

The reasoning of the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, is also in direct conflict with § 1620.14 (1987) (See 29 CFR Ch. XIV (7-1-98 Edition)) and Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970); Hodgson v. Fairmont Supply Co., 454 F.2d 490 (4th Cir. 1972); Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973); Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir.1982).

"In analyzing work for equality the focus is upon the duties actually performed by the employees. Job

titles and job descriptions are relevant, but not controlling." (See Epstein v. Secretary of Treasury, 739 F.2d 274 (7th Cir. 1984)). "The Four Statutory Elements of Equality are (1) Skill, (2) Effort, (3) Responsibility and (4) Working Conditions." (See § 411, pages 146-150 in Employment Discrimination Law by Mack A. Player, Hornbook Series (1995)).

The reasoning of the opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, is in direct conflict with the 2nd Circuit and 6th Circuit which uses the test of "all material respects" to compare similarly situated employees in Title VII cases. And "whether two employees are similarly situated....presents a question of fact for the jury." (See Graham v. Long Island Rail Road 230 F.3d 34 (2nd Cir. 2000).

"Skill" refers to the objective level of ability or dexterity tto perform job tasks. It is examined in terms of whether the duties of the two jobs require different levels of education, experience, training or natural ability to perform. (See 29 C.F.R §1620.14 (1987)) page 146 in § 4.11 See § in Employment Discrimination Law by Mack A. Player, Hornbook Series (1995)).

The petitioner contend that as an Electronic Technician level 11 the petitioner met all four requirements for the training pursuant to§ 1620.14-§ 1620.18 of 29 CFR Ch. XIV) and Article 38 of the Collective Bargaining Agreement (Contract).

The opinion of Court of Appeals for the 11th Circuit in this case as stated in Appeal # 06-15613, is in direct conflict with "Notice Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination, 69 Fed. Reg 67246 (November 16, 2004)" which states:

"This standard defines "similarly situated" employees as those that are "similar with respect to the work they perform, their responsibility level, and the skills and qualifications involved in their positions." [67251]".

The Contract, which states in 38.6.A.1 the occupational group, level, and tour defines "similarly situated" employees for Electronic Technicians at the USPS. (See DE# 20 pages 11-29 of Case 1: 04-cv-22267).

Training

The 11th Circuit held in Davis v. Town of Lake, Florida, 245 F.3d 1232, 1242-43 (11th Cir. 2001)

"(where memo criticizing the plaintiff's job performance was removed from plaintiff's personnel file and there was no evidence that the memo affected the plaintiff's employment, the memo was not an adverse employment action)"

(See page 28 of DE 158 of Case 1:04-cv-22267-FAM). In this case undisputed evidence on the record has shown that Osahar was denied three training courses (DE #30 at ¶ 19 and (# 41-04 (DE # 30 at ¶16))) as a result of discrimination and or retaliation. Osahar was denied Network Cabling Courses #32601-39, (Tier 2), # 32601-40 (Tier 3) Course #55602-30) (See DE 30 page 12 and DE 78, pages 239-252 and DE 27 page 15) and Basic Programming of Allen-Bradley PLCS training (See DE 27 page 15 and DE 78 page 55 of District case no. 04-22267).

The District Court erred in its reasoning in its opinion that:

" In Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 760-61 (1998), a Title VII sex discrimination case, the Supreme Court defined an adverse employment action as a significant change in employment status, such as hiring, firing, failing to promote reassignment with significantly different responsibilities, or a decision causing a significant change in benefits—an action which in most cases inflicts direct economic

harm.".

And the 11th Circuit's opinion in applying Davis for retaliatory discrimination holding that "to establish adverse employment action under Title VII, Osahar must show a serious and material

change in the terms, conditions or privileges of his employment." (See page 27 of DE 158 in 1:04-cv-22267-FAM) is direct conflict with the Supreme Courts opinion in Burlington Northern & Santa Fe Ry. v. White,_U.S._126 S.Ct. 2405 (2006) and Title VII (42 USCS § 2000e-2 (d)) which states: **"It shall be an unlawful employment practice for any employer...training or retraining, including on-the-job training programs ... to discriminate against any individual..." .**

In **Burlington N. & S. F. R. Co. v. White, 548 U.S. 1 (2006)**, The Supreme Court held that:

"The language of the substantive and anti-retaliation provisions differ in important ways. The terms "hire," "discharge," "compensation, terms, conditions, or privileges of employment," "employment opportunities," and "status as an employee" explicitly limit the substantive provision's to actions that affect employment or alter workplace conditions. The anti-retaliation provision has no such limiting words.".

Osahar contends that he was denied equal

protection of the law pursuant to the 5th and 14th amendments of the Constitution as cited above and below.

The Supreme Court has held that Title VII,

includes not just the wage rate of the employees, but all forms of job benefits, including severance pay, pensions, vacations, availability of overtime, eligibility for training, and desirability of job assignments in Trans World Airlines, Inc. v. Thurston, 469 U.S.111, 105 S.Ct. 613, 83 L.Ed 2d 523 (1985).

The Eleventh Circuit has recognized that failure to provide training may constitute an actionable adverse action "as long as the training is **materially** related to the employee's job responsibilities or possibilities for advancement." Turlington v. Atlanta Gas Light Co., 135 F. 3d 1428, 1436 n.16 (11th Cir. 1998).". Osahar contends that the training that was denied, is materially related to his job responsibilities and possibilities for advancement (See DE 158, footnote 14 and DE 127 at Ex 292) and (page 15 of DE 158).

Overtime

On page 39 of DE 158 the District Court states: "Cole also stated that Osahar has worked sixth day overtime, every quarter, since Cole became Osahar's immediate supervisor in late 2000 (Cole Declaration at ¶48)" . Petitioner claims that this is a dispute and an issue of material fact (See DE 158, footnote 14 and DE 127 at Ex 292).

On page 15 of DE 158 the District Court states:

"The "bulk" time records provided for the years 2000 through 2005 list total overtime per employee per pay period, and do not designate the specific dates of overtime worked nor whether overtime listed for a particular pay period was based on the 6th day overtime rotation rather than an accumulation of hours worked past the normal eight-hour workday.

The absence of these records is not material". And "it is undisputed that Mike Denis does not have the same days off as Osahar, and thus Osahar and Denis would never be in competition for the same 6th day overtime work."

The petitioner contends that this is an issue of material fact (See DE 158, footnote 14 and DE 127 at Ex 292).

Article 8, Section 5 of the Collective Bargaining Agreement(See DE 20 page 19 of 1: 04-cv-22267), states **"When needed, overtime work for regular full-time employees shall be scheduled among qualified employees doing similar work in the work location where the employees regularly work in accordance with the following: *****
C. 1.a. When during the quarter the need for overtime arises, employees with the necessary skills having listed their names will be selected in order of their seniority on a rotating basis."

The Supreme Court held in Ledbetter v.

Goodyear Tire & Rubber Co. , Inc. 550 U.S.__(2007) "Because the later effects of past discrimination do not restart the clock for filing an EEOC charge, *** "if an employer engages in a series of separately actionable intentionally discriminatory acts, then a fresh violation takes place when each act is committed." (See Ledbetter v. Goodyear Tire & Rubber Co. , Inc. 550 U.S.__(2007)).
On page 34 of D.E.158 the district Court states "the undisputed evidence establishes that Osahar, having attended 60 training courses, is one of the most trained electronic technicians at the Miami facility (Cole Declaration at ¶28; DE # 127, Ex. 269 (Osahar's training records).)" This training that was denied is unique and not based on total number of courses and Electronic Technician completing the training receives the assignment (See D.E.No. 158 pages 13 and 34 for Case # 04-22267). (See page 11 of Appeal 06-15613). In Appeal # 06-15613 on page 19, the 11th Circuit held that:

"Osahar was never suspended, nor did he suffer any reduction in wages, job title, seniority status or any other benefits. He also attended more training courses than all but one of the co-worker whom he complains; Sosa attended ten courses between 2001 and 2004 while Osahar attended nine.".

The petitioner contends that this is weighing the evidence **to resolve a factual dispute** and the district court and the Appeals Court reasoning on the evidence is in direct conflict with Holifield v. Reno.

In Holifield v. Reno, the Court held that: "The Court may not weigh evidence to resolve a factual dispute; if a genuine issue of material fact is present, the court must deny summary judgment. Hutcherson v. Progressive Corp., 984 F.2d 1152, 1155, (11th Cir. 1993)." Holifield v. Reno, 115 F.3d 1155, 1561 (11th Cir. 1997).

The Supreme Court held "To determine whether due process requirements apply, courts must not look to the "weight," but to the nature, of the interest at stake, to see if the interest is within the Fourteenth Amendment's protection of liberty and property " See page 551 of Board of Regents v. Roth, 408 U.S. 564 , 92 S.Ct. 2701 33 L.Ed 2d 548. The petitioner contends that pursuant to Board of Regents v. Roth, each training course that was denied, should be viewed for "the interest at stake" not as to the number of courses the petitioner attended between 2001 and 2004.

The petitioner contends that he was deprived "of and interest in "liberty" or that he had a "property" interest in" seniority of employment as cited on page 554 of Roth.

The petitioner contends that being denied equal protection of the law concerning seniority pursuant to the 5th Amendment Clause of the Constitution and Title VII is an unresolved issue of law that precludes entry of judgment.

PRETEXT

On page 38 of DE 158 the District Court states:

"Defendant did not select Osahar for the Allen-Bradley PLC training (49-04), because there was a need to train a TMS employee with respect to the PLC process and because Osahar had previously received this training in another course (Cole Declaration, ¶28; DE # 78 at Ex. 69." The petitioner contends that this is an issue of material fact and a pretext by the USPS to deny petitioner seniority in the selection process for training.

As held in E.g., Williams v. Montgomery, 742 F.2d 586 (11th Cir. 1984); Corley v. Jackson Police Dept., 566 F.2d 994 (5th Cir 1978) that if the selection process has not been uniformly applied to members of other classes it can be used as evidence of a pretext. The petitioner also contends that record shows a preponderance of evidence of a pretext as cited below and above.

HARM

The Court has held that "Irreparable harm exists where there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult or incomplete. See Crestmont Cadillac Corp. v. General Motors Corp., Cuyahoga App. No. 83000, 2004-Ohio-488."

The petitioner contends that the opinion on dismissal pursuant to FRCP 56 for summary judgment in favor of the USPS by the 11th Circuit Court of Appeals in case # 04-16036 is in direct conflict with the Second, Fourth, Fifth Seventh and Eighth Circuits as held in Gallo v Prudential Residential Servs., Ltd. Partnership (1994, CA2 NY) 22 F3d 1219, 64 BNA FEP Cas 950, 64 CCH EPD ¶ 42998[courts should be reluctant to grant summary judgment in cases alleging employment discrimination, when intent of employer is at issue]; Rosen v Thornburgh (1991, CA2 NY) 928 F2d 528, 55 BNA FEP Cas 580, 56 CCH EPD ¶ 40633 [summary judgment is generally inappropriate in Title VII cases where defendant's state of mind and intent are at issue].

EQUAL PROTECTION OF THE FIFTH and FOURTEENTH AM**ENDMENT - RIGHTS OF PERSONS, DUE PROCESS , Substantive Due Process, Discrimination.**

On page 5 of Appeal no. 06-15613, The appeals Court states **"(3) "[l]os[s] liberty of the equal protection of the law the law related to seniority and qualifications." id. at ¶¶ 17-18."**

The petitioner contends that the Appeals Court and the District Court erred in its decision concerning the lost of liberty of seniority (property interest) pursuant to the 5th and 14th Amendment to the

Constitution, Equal protection of the Law clause as applied to adverse action in this case.

The Court in Board of Regents v. Roth, 408 U.S. 564 said that "property interest protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money". Osahar contends that denial of seniority in the selection of training also deny economic rights pursuant to Lochner v. New York 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 (1905). Pursuant to Board of Regents v. Roth, 408 U.S. 564 seniority is a "property interest" protected by procedural due process.

In United States v. Virginia, 116 S.Ct. 2264 (1996) the supreme court has recognized lost of training as an adverse action.

Pursuant to equal protection clause and due process of the 5th and 14th Amendment of the Constitution, which provides that "[n]o State shall *** deny to any person within its jurisdiction the equal protection of the laws," ***. In 1975, The Court held that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." See Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 . (See United States v. Virginia, 116 S. Ct. 2264 (1996)).

"As this Court explained in Roth, 408 U.S. 564 (1972), "the Fourteenth Amendment's procedural

Protection of property is a safeguard of the security of interest that a person has already acquired in specific benefits. These interests – property interest – may take many forms." This Court went on to note that a property interest requires " a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims." Roth, 408 U.S. 576.

Of course, the Constitution itself does not create the property interest it protects. "Rather," as Roth points out, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id. at 577".

This Court has "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money" Roth, 408 U.S. at 571-572. The "types of interests protected as 'property' are varied and, as often as not, intangible, 'relating to the whole domain of social and economic fact" Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) (See also Cleveland Bd. Of Ed. v. Loudermill, 470 U.S. 532 (1985)(Government employment)) "

As the Court has held in Trans World Airlines, Inc. v. Thurston, referring to "eligibility for training, and desirability of job assignments" that not allowing the senior pilots to "bump" the downward to a flight engineer (training) discriminated on the basis of age. As with Trans World Airlines, Inc. v. Thurston, this deprives the Appellant of seniority for other purposes. (See Article 38.3.B of the Collective Bargaining Agreement and Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 105 S.Ct. 613, 83 L.Ed 2d 523 (1985); Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097, 2106-08 (1995); Board of Regents v.Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.

FULL FAITH AND CREDIT

Osahar prevailed in 1986 in Case No. 84-1782-CIV-ARONOVITZ and was awarded seniority.

Osahar prevailed again in a case he filed in 1995, which alleged racial discrimination (lost of training by seniority) and retaliation. Case No. 95-753-CIV-LENARD. On September 25, 2001 the Court, based upon the jury's verdict."

Article IV, Section 1 of the United States Constitution and 28 USC 1738 provides for full Faith and credit of judgments.

The Supreme Court has upheld Full Faith and Credit Judgments in Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104 (1938); Cresent City

Live-Stock Co. v. Butchers' Union Slaughter-House Co., 120 U.S. 141, 7 S.Ct. 472, 30 L.Ed. 614(1887); Embry v. Palmer, 107 U.S. (17 Otto) 3, 2 S.Ct. 25, 27 L.Ed. 346 (1882); Loveridge v. Fred Meyer, Inc., 72 Wn.App. 720, 864 P.2d 417 (1993).

COLLATERAL ATTACK

Osahar contends that denying the petitioner three training slots and overtime is a collateral attack on the judgments of and an attack on the integrity of the judgment of and which violates the jury verdict in Case No. 95-753-CIV-LENARD and bench case Case No. 84-1782-CIV-ARONOVITZ.

The court has described a collateral attack as " 'an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved.' " Fawn lake Apts. V. Cuyahoga Cty. Bd. Of Revisio (1999), 85 Ohio St.3d 609, 611, 710 N.E.2d 681, quoting Kingsborough v. Tousley (1897), 56 Ohio St. 450, 458, 47 N.E. 541.

Black's Law Dictionary (8th Ed.2004) 278 defines "collateral attack" as "[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective. A petition for a writ of habeas corpus is one type of collateral attack. – also termed indirect attack. Cf. Direct Attack (1)."

"In general , a collateral attack on a judgment is actually an attack on the integrity of the judgment." (See Ohio Pyro, Inc. v. Ohio Dept. of Commerce, 115 Ohio St.3d 375, 2007-Ohio-5024, Appeal , page 12).

DISPARATE IMPACT

On page 3 of DE # 158 the District Court cited petitioners complaint of disparate impact"
"due to this, race discrimination and retaliation against him have continued, which has compelled him to file EEOC Complaints due to disparate treatment, disparate impact and a hostile work". Which shows the petitioner intent not to abandon his Disparate impact claim.

REASONS FOR GRANTING THE PETITION

The legal issues presented by this petition are of paramount public importance for federal employees throughout the United States.

The Court has held in Speiser v Randall, 357 US 513, 2 L Ed 2d 1460,78 S Ct 1332, when a State proposes to deny a privilege to one who it alleges has engaged in unprotected speech, Due Process requires that the State bear the burden of proving that the speech was not protected. "[T]he 'protection of the individual against arbitrary action' ... [is] the very

essence of due process," Slochower v Board of Education, 350 US 551, 559, 100 L. Ed 692, 701, 76 S. Ct 637 (1956). See page 565 of Board of Regents v. Roth, 408 U.S. 564 , 92 S.Ct. 2701 33 L.Ed 2d 548.

The not allowing the use of seniority in selection for training and the use of qualifications in assignments allows the U.S.P.S to discriminate and retaliate, not violate the union contract agreement, deny due process and equal protection of the law in violation of the due process clause and equal protection of the law clause of the 5th and 14th amendment of the constitution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

By_____
Omar Osahar, Pro Se, Petitioner
10941 S.W. 143 Terrace
Richmond Heights, Florida 33176-6554
305-253-0204
September 17, 2008

APP. 1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-16036
Non-Argument Calendar

D.C. Docket No. 04-22267-CV-FAM

OMAR R. OSAHAR,

Plaintiff-Appellant,

Versus

U.S. POSTAL SERVICE,
POSTMASTER GENERAL OF U.S. POSTAL SERVICE, UNITED STATES OF AMERICA, ATTORNEY GENERAL

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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APP. 2

(January 15, 2008)

Before ANDERSON, BARKETT and HULL, Circuit Judges.

PER CURIAM:

OMAR R. OSAHAR appeals the district court's grant of summary judgment in favor of the Postmaster General as to all of his employment discrimination and related claims, Osahar asserts that the district court erred by finding, inter alia, that he failed to establish that the Postmaster General's articulated legitimate, non-discriminatory reasons for its actions were a pretext for unlawful discrimination or retaliation, that the court lacked jurisdiction over certain of his claims, and that he had failed to exhaust his administrative remedies as to others. We AFFIRM.

I. BACKGROUND

Osahar, an African-American male proceeding pro se, filed an employment discrimination action against his employer, the Postmaster General, in the Southern District of Florida. Osahar is employed by

the United States Postal Service ("USPS") as an electronic technician ("ET"). He has worked for the USPS for more than 30 years.

A. Incidents Alleged

In support of his claims Osahar's complaint asserts the following incidents which allegedly occurred between October 2001 and August 2004 and about which he had already formally complained to the EEOC. At the time he filed suit, he alleged that his EEOC complaints had all been pending for at least six months without a final agency determination.

On or about 22-23 October 2001, a white ET junior to Osahar was allowed to make primary software loads. Osahar contends that this encouraged his co-workers to disrespect him because the primary load is a more desirable assignment. On

or about 21 May 2002, (1) Osahar's blue rolling tool box was broken into on several occasions; (2) Osahar's supervisor, Robert Cole, took Osahar's camera away fro him when Osahar "tried to take pictures of harassment," even though Osahar had seen others using cameras on the workroom floors; (3) tasks which Osahar preferred were transferred to another shift thereby impacting his ability to work overtime; (4) Osahar was subject to disrespect due to "unfairness in assignment and task"; (5) on or about 29 May 2002, Cole would not allow Osahar to "do the Zebra Card alignment for the AFCS [e]quipment" and also "restrict[ed his] [i]involvement in alignment jprocedures"; and (6) Osahar was subject to "[c]ontinuous harassment on the workroom floor." R2-30, Second Corrected Final Compl. At ¶ 15.

On or about 16 November 2002, (1) Osahar was decertified on powered industrial equipment because Cole and other management officials scheduled him for training on the day after his last day of certification resulting in the suspension of his privileges; (2) the USPS was "capricious in [o]vertime rotation" in that it "coordinated the task and [o]vertime to give the junior [w]hite and Hispanic employees the advantage," depriving Osahar of his "seniority rights." Id. at ¶ 14. On or about 3-9 December 2002 and 9-10 January 2003, Osahar was "systematically bypassed or told that he could not work sixth day overtime." Id. at ¶ 11. On 28 September 2003 and 28 October 2003, Osahar was (1) not selected for MODSS system training; (2) "[n]ot awarded for work performed on the AFCS" when he had done most of the work and others

received awards; and (3) restricted from certain work assignments. Id. at 12.

On 31 December 2003, (1) a coworker was allowed to use two time cards; (2) a co-worker was allowed access to lockout cabinets when Osahar was not; (3) two co-workers blocked or delayed Osahar's access to his assigned task; (4) Osahar's tool box was pushed out of his assigned area; (5) "[o]thers created an unwanted appearance in [Osahar's] work area"; and (6) "[a]nother co-worker has been allowed to perform [certain work which has given Osahar] limited experience [in that area]." Id. at ¶ 10.

From August 23-26, 2004, Osahar suffered from "unfairness," retaliation and discrimination in training and overtime, by not being selected for two network cabling training courses. He also suffered from (1) the "arbitrary and capricious use of

training, seniority qualification and safety in the use of assignments overtime and promotions"; (2) "[d]iscriminat[ion] by encouraging disrespect by unfairness in [a]ssignments, overtime, terms and conditions of employment"; and (3) "[1]os[s] of liberty of the equal protection of the law related to seniority and qualifications." Id. at ¶¶ 17-18. Finally, at an unspecified time, Osahar suffered a "[l]os[s] of liberty of seniority in the selection process" when he was not selected for a training course for Basic Programming of Allen-Bradley PLC. Id. at ¶ 19. Osahar has also alleged that the USPS has breached settlements agreements with Osahar dated 12 December 1989 and 2 June 1992.

In his final amended complaint, filed in the Southern District of Florida, Osahar has alleged on the basis of these incidents: (1) a "los[s] of liberty

normal[ly] given to senior...employees in an agency with a seniority system and [t]raining policy" in violation of the equal protection clause of the Fifth Amendment; (2) "[v]iolation of [i]ndividual [c]ontracts concerning fairness in employment with the agency and laws of the state of Florida" in violation of the equal protection clause of the Fifth Amendment. R2-30 at ¶¶ 29-30. Osahar also asserts his complaint "pursuant to the Civil Rights Act of 1964 as amended, 42 [U.S.C.] § 1981 and 42 [U.S.C.] § 1983." Id. at ¶ 1. Finally, Osahar's complaint refers to "39 [U.S.C.] Labor Relations Act, TITLE III, § 301, 29 [U.S.C.] § 185 as related to related issues of [b]reach of individual contracts ([union and non-union])." Id. at ¶ 4.

B. General Background

The record reflects the following additional facts:[1] at all relevant times, Osahar has been assigned to work on Tour 2, the 6:30 A.M. to 3:00 P.M. shift five days a week and his days off have been Sunday and Monday. Sunday and Monday are thus the days he is eligible to work a sixth day for overtime compensation. Tour 2 is the preventive maintenance shift and the ETs on this shift perform the cleaning, preparation and testing of all postal equipment. Daily assignments are made based on the needs of the USPS and the maintenance requirement of each individual piece of equipment. The particular work assignments given to an ET on Tour 2 during the eight-hour work day does not affect that person's

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[1] Herein we have borrowed portions from the orderly recitation of facts set out in the magistrate judge's report and recommendation (R7-158).

wages, job title, seniority or other employment benefits.

Cole has been Osahar's immediate supervisor from approximately late 2000 to the present. Cole was supervised by DeWayne Wilkie. Wilkie was supervised by Joseph Giambrone. In 2002, Osahar's position was upgraded from a level 9 to a level 10, and in 2003, his position was upgraded from a level 10 to a level 11. Osahar is number three on the seniority list, and he has seniority over all of the co-workers about whom he complains in this case. During the period at issue, Osahar was never suspended, nor did he suffer any reduction of wages, benefits, seniority, or job title.

The wages, hours, and working conditions of USPS maintenance craft employees such as Osahar are governed by Article 38 of the collective

bargaining agreement in effect between the American Postal Workers Union and the USPS. This agreement permits the USPS to determine daily tasks and assignments. It requires that all training opportunities in levels 1 through 7 be offered first to the senior qualified volunteer within the occupational group, level and tour where the need for the skills exists. Job-related training in levels 8, 9, and 10 must also be selected from volunteers within the occupational group, level, and tour where the need for the skills exists, except that the employer may choose not to select a volunteer who has attended training for 6 or more weeks during the previous 12 months. Job-related training in levels 8, 9 and 10 is not subject to seniority. The agreement contains no provision with respect to selection for training of employees above level 10.

C. Prior EEO Activity

It is undisputed that prior to and during the time of the events he alleges in his complaint, Osahar had filed formal complaints of discrimination, and that his supervisors were aware of this. Settlement agreements were reached in two cases. The first settlement agreement, which was executed in December 1989, states that Osahar

> will have the same opportunities as other ET's to work on equipment and do filing updating and software changes. Complainant is [to] be provided the same training and have access to information and pro[cedures] regarding file updating and software changes as other ET's. The complainant is to be treated equally and fairly as other employees. He will be treated the same as Mr. Foland and Mr. Aquilino on

learning and working PSDS II. He will be given same opportunity to become proficient as other employees. Based on merit, Mr. Osahar will be granted awards as all other ET's. Specifically, if Bob Foland and Mr. Aquilino receive awards for installation of PSDS System, since I also worked on the system, I receive the same award in relationship to this process.

R(Accordian 2)-127, Exh. 290. The second settlement agreement, which was executed in June 1992, states:

I will be given the opportunity to work in other areas as all other employees and be given the chance to advance my skills for upward mobility. In the future I be allowed to receive the opportunity to go to seminars and train other ETs in new systems. That I'm treated and paid

equal as all other employees. Any and all special. That I'm treated and paid equal as all other employees. Any and all special assignments [undecipherable] all interested ET's. Schedule meeting and to abide by this and all other EEO Settlements [including] 3-S-1106-90 and 3-1157-91 [undecipherable] with this settlement [undecipherable] when available.

Id., Exh. 289. These agreements provide that if the agency fails to abide by the agreements, the USPS will "upon the complainant's written requirest, reinstitute the counseling process." Id., Exhs. 289, 290.

In addition, Osahar has prevailed in the U.S. District Court for the Southern District of Florida on at least two previous complaints alleging discrimination and/or retaliation against the USPS.

In July 2002, Osahar filed another employment discrimination case against the USPS based on twelve EEO complaints involving incidents that occurred between 1995 and 2001, including claims based on hostile work environment and denial of training. Summary judgment was granted in favor of the USPS in Februray of 2004.

D. Training

In June 2004 two memoranda were issued soliciting volunteers to attend training courses on Network Cabling Copper Based System Tier 2 and Network Cabling Fiber Based Systems Tier 3. Neither was a prerequisite for the other, but both were required for Network Cabling Specialist certification. Three people applied for the courses, Osahar, Oscar Sosa, and D. Sotolongo. Cole selected Oscar Sosa to attend both course.

Oscar Sosa is a white Hispanic male who is junior to Osahar. Cole's selection was approved by Giambrone. Cole explained in his declaration that the reason for selection Sosa was that he needed someone who was trained on the Tray Management System (TMS) to be trained with respect to network cabling. In an affidavit provided in response to the related EEO complaint. Cole further explained that:

> The Miami plant has a machine called TMS (tray management system) which transports all mail in the facility to other processing equipment. For about five months the TMS system has been frequently dropping out of service and causing delays. The TMS trained E.T[.]'s have been working on the problem but feel the problem is in the fiber-optic cabling running throughout the system but

> none of them are trained on trouble shooting or repairing these fiber-optic cables. Since it was in the best needs of the service to have a TMS trained employee with the cabling training, I chose Mr. Sosa because Mr. Osahar is not TMS trained.

R(Accordian 1)-78, Exh. 116, Aff. B at 1.

In July 2004, a memorandum was issued requesting volunteers to attend a training course entitled "Basic Programming of Allen-Bradley PLCs."[2] There were seven applicants: Osahar, M. Denis (white male), G.Acker (white male), D. Ewing (black male), D. Sotolongo (white Hispanic male), J. Mims (white male), and Julio Fojo (white Hispanic

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[2] PLC stands for "programmable logic controller." A PLC is a computerized device that runs the TMS machine. The device is manufactured by two companies-Allen Bradley and Horner Electric. At the Miami postal facility, the TMS is run by a Horner Electric PLC, but the only training offered is by Allen Bradley; however, the PLC system is the same, regardless of the manufacturer.

male). Fojo was selected to attend. Since Cole was on vacation at the time the selection was made. Wilkie made the selection, and Cole concurred upon his return. In his affidavit in response to the EEO complaint, Wilkie explains that he selected Fojo because although he was trained to service the TMS system which utilizes Allen-Bradley PLCs, Fojo had not been trained on the Allen-Bradley PLCs. Id., Exh. 69 Aff. D at 1. Cole explains further that Osahar had previously attended RCS training which included Allen-Bradley PLC training. Id. , Aff. B at 3. Cole reported that when he discussed this with Osahar, Osahar had acknowledged that he had received the RCS training and that he was trained on the Allen-Bradley PLC, but pointed out that the Allen Bradley training at issue bore a different course number. Id.

Osahar's complaint relating to MODSS training is less clear. He was unable to say exactly when in 2003 or 2004 the training occurred but alleged that a white employee, Bob Aquilino, had been chosen to receive the training. However, the record indicates that Bob Aquilino retired in 2000, well before the alleged training took place.

Records of employee training through the end of December 2005 were submitted for employees Osahar, Sosa, Denis and Fojo, and other employees assigned to Tour 2. These records demonstrate that the USPS provides a significant number of training courses throughout the year. For example, Osahar attended 60 training courses between August 1982 and October 2005; nine of those were between 2001 and 2004 and seven were in 2005. R(Accordian 2)-127, Exh 269. Denis attended 40 between September

1990 and June 2005; five were between 2001 and 2004 and three were in 2005. Id., Exh. 267. Sosa attended 52 between January 1987 and June 2005; ten were between 2001 and 2004 and two were in 2005. Id. , Exh. 263. Fojo attended 50 between June 1989 and October 2005; seven were between 2001 and 2004 and six were in 2005.

D. Overtime

Overtime is assigned on an "as needed" basis, in accordance with following procedure: At the beginning of each quarter, with respect to each Tour, a list is posted with all the names of the ET's. Each employee then initials the list to indicate whether or not they would like to be considered for overtime. Based upon these responses, the Overtime Desired List (OTDL) is created according to seniority. Thereafter, if a need for overtime arises on a

particular day and Tour, upper level management looks at the list to determine which employees are off on that day, and therefore available to be called in to work a sixth day as overtime. From that group, management looks to see which of those employees has the skills and/or certifications needed for the overtime job at issue. From the group of available, qualified employees, the person who is next on the overtime rotation list is selected. Once a person works a sixth day of overtime, that person's name goes to the bottom of the list.

In the affidavit in support of one of his EEO complaints, Osahar averred that during the week before 9 December 2002 he was bypassed for his Monday of overtime, but junior white and/or Hispanic ETs were told they could work a sixth day of overtime; and few weeks later, Denis worked

overtime on AFCS, for which Osahar asserted Denis was "not trained." R (Accordian 1)-78, Exh. 82, Aff. A at 7. The records provided for the twenty-second pay period of 2002 through the second pay period of 2003 reflect that Denis worked sixth-day overtime four times on Fridays and twice on Thursday, and Osahar worked overtime seven times on Mondays. See R3-76, Exh. 64 at 123-34. It is undisputed tha Denis did not have the same days off as Osahar at this point. Thus, they could not have been in competition for the same sixth day of overtime work.[3]

With respect to the complaint in which Osahar asserts unfairness in the overtime rotation including

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[3] When asked, at his deposition, to explain his claim regarding the opportunity to work a sixth day of overtime, Osahar could not explain how evidence of overtime worked by people with different days off, on days he was already working his regular schedule, would demonstrate discrimination or retaliation against him. See R4-120 at 114-17.

16 November 2002, Osahar was asked specifically which individual received overtime when Osahar did not. Osahar identified Oscar Sosa, Mike Denis, Robert Williams, and "possibly some other people." R4-120 at 201. Robert Williams is a junior African-American ET. Osahar does not, in his briefs, point to any place in the record which specifically identifies a day on which he was available to work a sixth day of overtime but wrongfully deprived of that opportunity because the USPS assigned that day to someone else.[4] We are unable to find any occasion in the

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[4] Overtime records for the last quarter of 2002 do include two instances in which Sosa worked a sixth day of overtime on a Sunday in the same week that Osahar did not work any overtime. But, overall, Sosa only worked two sixth days more than Osahar, and one during a week in which Osahar was apparently not at work since he does not appear to have worked his regular Saturday workday either. See R (Accordian1)- 78, Exh 82, Aff. C at 32-43 (see particularly 33). Other records covering the first week of the twenty-first pay period in 2003 through the second week of the sixth pay period in 2004, indicate that, with the exception of 2003-21-1 and 2003-24-1, Denis's regular days were Saturday through Wednesday. R(Accordian 2)-127, Exh. 293 at 657-724. There is

record upon which Osahar did not receive a sixth day of overtime to which he was entitled, or any instance of a junior employee receiving more sixth days of overtime on Sundays and Mondays than Osahar did.[5]

E. Procedural History

In response to Osahar's complaint, the USPS asserted, inter alia , that all of the employment actions alleged in the complaint were taken for legitimate, non-discriminatory reasons, and that Osahar failed to exhaust his administrative

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one week, 2003-21-1, during which he appears to have worked regular days Monday through Friday and a sixth day of overtime the Sunday before that. Id at 701. Corresponding records for Osahar during this period are not included. Further, Osahar fails to explain exactly how any of these records demonstrate that he was available for overtime, but denied it in favor of someone else.

[5] Because Osahar's appeal is limited to issues related to training and overtime opportunities, we omit further discussion of facts related to other workplace incidents regarding tool boxes, trash, and access to work areas which were raised only in Osahar's complaint.

remedies as to certain of his claims. After discovery was complete, the USPS moved for summary judgment as to all claims. Osahar filed a motion for summary judgment as well.

Adopting a report and recommendation (R&R) made by the magistrate judge, the district court granted the USPS motion for summary judgment and denied Osahar's amended motion for summary judgemt. The magistrate judge had made the following findings with regard to Osahar's claims: (1) Osahar could not show disparate treatment based on his race because he could not establish an adverse employment action, or that similarly situated employees who were not in the protected class were treated more favorably; (2) he could not establish a prima facie case of retaliation; (3) he could not show that his employer's proferred legitimate, non-

discriminatory reasons for its actions were a pretext for unlawful discrimination or retaliation; (4) the incidents alleged were not sufficiently pervasive or severe to create a hostile work environment; (5) he failed to exhaust his administrative remedies with regard to his breach of contract claim; (6) the district court lacked jurisdiction to consider Osahar's claims under 42 U.S.C. §§ 1981 and 1983 because the Postmaster "is an official of the United States acting in his official capacity, and the United States had not waived its sovereign immunity as to" these claims, R7-158 at 45, and Osahar's claim pursuant to § 1983 also failed because that section applies only to violations of federal constitutional rights under the color of stated law; and (7) Osahar's claim of unfair union representation had been improperly included in his response to the Postmaster General's motion

for summary judgment because Osahar had not asserted that claim in his final complaint, and even if the court were to consider it on the merits, the Union's decision not to take Osahar's grievance to arbitration was not so far outside a wide range of reasonableness so as to be irrational.

On appeal, Osahar rehashes his arguments regarding the USPS's alleged discriminatory and retaliatory decisions regarding job assignments, and training and overtime opportunities. He also asserts his arguments regarding clais pursuant to 42 U.S.C. §§ 1981 and 1983 and exhaustion of administrative remedies.[6]

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[6] Osahar additionally asserts that the district court erred by not addressing his disparate impact claim. A review of the record shows that, although Osahar made a passing reference to a disparate impact claim in the first three pages of his complaint, he never presented argument in support of the claim. For this reason, he may not raise the issue on appeal. See Narey v. Dean, 32 F.3d 1521, 1526-27 (11th Cir. 1994) (subject to five exceptions, none of which are applicable here,

II. DISCUSSION

We review a district court's grant of summary judgment is reviewed de novo. Rojas v. Fla. Dep't of Bus. & Prof'l Regulations Pari-Mutual, 285 F.3d 1339, 1341 (11th Cir. 2002) (per curiam). A court shall grant summary judgment when the evidence before it shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.

"appellate courts generally will not consider an issue or theory that was not raised in the district court,").

Similarly, Osahar contends that the district court erred in granting summary judgment in favor of the Postmaster General on his unfair representation claim pursuant to the Labor Management Relations Act, 29 U.S.C. § 185. Although Osahar did argue this claim before the district court at the summary judgment stage, it goes beyond the relief he requested in his final amended complaint. Accordingly, the district court properly granted summary judgment See Gilmour v. Gates, McDonald & Co., 382 F. 3d 1312, 1314-15 (11th Cir. 2004) (per curiam) (new claims may not be added in a brief opposing summary judgment).

Finally, Osahar has abandoned his hostile work environment claim by not arguing in support of it in his briefs on appeal. Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570, 1573 n.6 (11th Cir. 1989) (issue is waived on appeal where party "elaborates no arguments on the merits as to [the] issue in its initial or reply brief").

R.Civ. P. 56(c). "When deciding whether summary judgment is appropriate, all evidence and reasonable factual inferences drawn therefrom are reviewed in a light most favorable to the non-moving party." Rojas, 285 F.3d at 1341-42 (citation and quotations omitted).

"Pro se pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed" Tannenbaum v. United States 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam). However, in the context of summary judgment, even though pro se pleadings are entitled to a more lenient interpretation, "the plaintiff must still meet the essential burden of establishing that there is a genuine issue as to a fact material to his case." Holified v. Reno, 115

F.3d 1555, 1561 (11th Cir. 1997) (per curiam) (appending district court order). Further, even for pro se litigants, "issues not raised below are normally deemed waived." Tannenbaum , 148 F .3d at 1263.

A. Title VII Disparate Treatment

Title VII prohibits an employer from discriminating against a person based, inter alia , on that person's race. See 42 U.S.C. § 2000e-2(a)(1).[7] Under Title VII, a "plaintiff always bears the ultimate burden of proving discrimatory treatment by a preponderance of the evidence." Earley v. Champion Int'l Corp.,907 F.2d 1077, 1081 (11th Cir. 1990). Absent direct evidence of an intent to discriminate, a plaintiff may prove his case through circumstantial evidence, using the burden-shifting

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[7] 42 U.S.C. § 2000e-16 extends the protection afforded by Title VII to employees of the USPS.

framework established in McDonnell Douglas Corp. v. Green,411 U.S. 792, 93 S.Ct. 1817 (1973). The first step is to establish a prima facie case of racial discrimination, which a plaintiff may do by showing that: (1) belongs to a protected class; (2) he was qualified to do the job; (3) he was subjected to adverse employment action; and (4) his employer treated similarly situated employees outside his class more favorably. See Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003) (per curiam). An adverse employment action must effect "a serious and material change in the terms, conditions, or privileges of employment." Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1239 (11th Cir. 2001). Further, regardless of the employee's subjective view, "the employment action must be

materially adverse as viewed by a reasonable person in the circumstances."[8] **Id.**

If the plaintiff establishes a prima facie, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the adverse employment action. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824. If the employer does this, the burden shifts back to the plaintiff to show that the employer's stated reason was a pretext for discrimination. See id. at 804, 93 S. Ct. at 1825; Holifield, 115 F.3d at 1565. The inquiry into pretext requires us "in view of all the evidence, [to] determine whether the plaintiff has cast sufficient doubt on the defendant's proffered

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[8] This standard is unaffected by the Supreme Court's decision in Burlington Northern & Santa Fe Ry. v. White, __U.S.__, 126 S.Ct. 24005 (2006). The Court clarified that its discussion of the standard for an adverse employment action with regard to retaliation claims did not apply to substantive discrimination claims brought pursuant to Title VII. See id. at 2414.

nondiscriminatory reasons to permit a reasonable factfinder to conclude that the employer's proffered legitimate reasons were not what actually motivated its conduct." Combs v. Plantation Patterns , 106 F.3d 1519, 1538 (11th Cir. 1997) (citation and quotations omitted). "[A] plaintiff may not establish [pretext] merely by questioning the wisdom of the employer's reason." Id. at 1543. Instead, the plaintiff must "meet [the employer's reason] head on and rebut it." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1088 (11th Cir 2004).

First, during the period at issue, Osahar was never suspended, nor did he suffer any reduction in wages, job title, seniority status or any other benefits. He also attended more training courses than all but one of the co-workers about whom he complains; Sosa attended ten courses between 2001

and 2004 while Osahar attended nine. As far as the record reflects, he worked a comparable number of sixth days of overtime to each of them of them as well. Accordingly, we find that he has not raised a genuine issue of material fact as to an adverse employment action sufficient to qualify him for a disparate treatment claim. See Davis, 245 F.3d at 1239.

Second, even assuming that the extent to which Osahar alleges to have been bypassed for overtime assignments did rise to the level of adverse employment action. Osahar has failed to point to any record evidence[9] that he was both qualified and available to work overtime under the USPS system for assigning it, but was passed over in favor of

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[9] Osahar does allude to documentary evidence not contained in the record, but does not even go so far as to specify the nature of this evidence. Appellannt's Br. At 23 ("See exhibits supplied will supply [sic] on Monday").

someone else, Further, he does not dispute Cole's statement that USPS employees are not entitled to overtime and that Osahar has worked at least one sixth day of overtime in every quarter since Cole became Osahar's immediate supervisor in late 2000. Accordingly, we find that Osahar has failed to raise a genuine issue of material fact as to whether the reasons given by the USPS as to why Osahar was not offered a sixth-day overtime assignment as often as he might have liked were pretext for racial discrimination.

Third, even assuming that Osahar could establish a prima facie case of disparate treatment as to training course, Osahar does not dispute that he has not attended formal TMS training or that he has never volunteered to attend. Neither does he point to any evidence that calls into doubt Cole's assertion

that he needed someone who was TMS trained to do the network cabling courses. Similarly, Osahar has failed to point to any evidence that might rebut Cole's assertion that Osahar was not selected for a certain Allen-Bradley training course because Osahar had already attended a course that covered the same material. Accordingly, we find that Osahar has not offered sufficient evidence to raise a question as to whether the USPS's proffered legitimate, non-discriminatory reasons for not sending him to certain training programs – that he was not Tray Management System ("TMS") trained (in connection with network cabling) and that he had already received some Allen Bradley PLC training – were pretext for unlawful discrimination. See Wilson , 376 F.3d at 1088.

B. Title VII Retaliation

Title VII also prohibits retaliation against an employee "because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing [thereunder]. 42 U.S.C. § 2000e-3(a). "A prima facie case of retaliation contains three elements: first, the plaintiff engaged in statutorily protected conduct; second, the plaintiff suffered an adverse employment action; and finally, the adverse action was causally related to the protected expression." Williams v. Motorola, Inc., 303 F.3d 1284, 1291 (11th Cir. 2002) (quotations omitted). Just as in a case of substantive discrimination, "[o]nce the plaintiff establishes his prima facie case [of retaliation], the employer must proffer a legitimate, non-discriminatory reason for

the adverse employment action. If the employer offers such legitimate reasons for the employment action, the plaintiff must then demonstrate that the employer's proffered explanation is a pretext for retaliation." Holifield, 115 F.3d at 1566 (citation omitted).

After the district court granted summary judgment in this case, the Supreme Court clarified that, in the context of claims brought pursuant to the anti-retaliation provision of Title VII, an adverse employment action includes those "employer action that would have been materially adverse to a reasonable employee or job applicant." Burlington N. & Santa Fe Ry. v. White, __U.S. __, 126 S.Ct. 2405, 2409 (2006). Consequently, the district court's conclusion, that Osahar had not demonstrated that he suffered an adverse employment action, is based

on a legal standard that is no longer controlling. Nevertheless, for the same reasons discussed in the context of his disparate treatment claims, Osahar has failed to raise a genuine issue of material fact as to whether the legitimate, non-discriminatory reasons for its actions articulated by the USPS might be a pretext for unlawful retaliation. See Holified, 115 F.3d at 1566. Therefore, summary judgment was properly granted in favor of the Postmaster General.

C. Claims Under 42 U.S.C. §§ 1981 and 1983

Osahar argues that the district court erred by dismissing his claims brought pursuant to 42 U.S.C. §§ 1981 and 1983 for lack of subject matter jurisdiction. Because 42 U.S.C. §§ 1981 and 1983 apply only against impairment of equal rights, or violations of federal or constitutional rights, under

color of state law, and because Osahar complains about actions taken under color of federal law, those claims were due to be dismissed for failure to state a claim upon which relief could be granted. 42 U.S.C. § 1981 (c); 42 U.S.C. § 1983; Lee v. Hughes, 145 F.3d 1272, 1277 & n.5 (11th Cir. 1998).

Nevertheless, because Osahar brings his claims pro se we also consider the possibility of a Bivens-type constitutional tort claim.[10] Given jurisdiction, creation of a Bivens –type remedy is only appropriate "where (1) the petitioner has no alternative means of obtaining redress, and (2) there are no special factors counseling hesitation." Lee v. Hughes, 145 F.3d 1272, 1275 (11th Cir. 1998) (quotation and citation omitted). As we have previously observed, Congress has already provided

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[10] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics 403 U.S. 388, 91 S.Ct. 1999 (1971).

an adequate alternative means of obtaining redress in the form of "final and binding grievance provisions in the Postal Service collective bargaining agreements, 39 U.S.C. § 12106(b)." McCollum v. Bolger, 794 F.2d 602, 607 (11th Cir. 1986) (relying on Bush v. Lucas, 462 U.S. 367, 103 S. Ct. 2404 (1983)). Accordingly, Osahar may not maintain any constitutional tort action in connection with his employment discrimination claims.

Even if he could, we have confirmed that Title VII "is the exclusive remedy for a Postal Service employee alleging illegal discrimination." Nagy v. U.S. Postal Service, 773 F.2d 1190, 1192 (11th Cir. 1985) (citing Brown v. Gen.Servs. Admin., 425 U.S. 820, 96 S.Ct. 1961 (1976)). Accordingly, all of Osahar's non-Title VII employment discrimination and retaliation claims, which were asserted based on

the same evidence, were properly dismissed on that basis.

D. Breach of Settlement Agreements

Finally, Osahar argues that the district court erred by finding that he failed to exhaust his administrative remedies with regard to the alleged breach of the two settlement agreements. Exhaustion of administrative remedies is a precondition to bringing any Title VII claim. See Brown v. General Servs. Admin., 425 U.S. 820, 832 (1976); Crawford v. Babbitt, 186 F.3d 1322, 1326 (11th Cir. 1999).

The settlement agreements specifically state that in the event of a breach, Osahar must file a written request with the USPS either to reinstate the settled complaint for further processing from the point at which processing ceased under the terms of the

settlement agreement or to reinstate the counseling process. R(Accordian 2)-127, Exs. 289-91. Further, EEOC regulations require a complaintant, within 30 days of the time he knew or should have known of any alleged noncompliance. 29 C.F.R. 1614.504(a).

The record does not reflect that Osahar ever contacted the USPS EEO office alleging breach of either settlement agreement identified in his complaint or that he filed a written request to reinstate the settled complaint as mandated by the agreements. Because Osahar has failed to perform the required acts, he has failed to exhaust his administrative remedies for the alleged breaches of settlement agreements. The district court, thus, properly found that it lacked jurisdiction to consider those claims.

III. CONCLUSION

Osahar appeals the district court's grant of summary judgment in favor of the Postmaster General as to all of his employment discrimination and related claims, the court properly granted summary judgment in favor of the Postmaster General. Because he failed to exhaust his administrative remedies with respect to his breach of settlement agreement claims, and because Title VII provides the exclusive remedy for employment discrimination actions brought by federal employees, his remaining claims were properly dismissed. Accordingly, we

AFFIRM.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 04-22267-CIV-MORENO

OMAR R. OSAHAR,

Plaintiff,

vs.

JOHN POTTER, Postmaster General of the United States,

Defendant.
_____/

FINAL JUDGMENT

Pursuant to Fed. R. Civ. P. 56 and 58, and in accordance with the reasons stated in the Court's Order Granting Summary Judgment on April 11, 2006, judgment is entered in favor of the Defendant John Potter, Postmaster General of the United States, and against Plaintiff Omar R. Osahar.

DONE AND ORDERED in Open Court at Miami, Florida, this 1st day of October, 2006

/S/
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

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Richmond Heights, Florida 33176

Aloyma M. Sanchez, AUSA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case Number: 04-22267-CIV-MORENO

OMAR R. OSAHAR,

Plaintiff,

vs.

JOHN POTTER, Postmaster General of the United States,

Defendant.
_____/

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THE MATTER was referred to the Honorable Andrea M. Simonton, United States Magistrate Judge, for a Report and Recommendation (D.E. No. 77) on August 24, 2005. The Magistrate Judge filed a

Report and Recommendation (D.E. No. 158) on March 21, 2006. The Court has reviewed the entire file and record. The Court has made a de novo review of the issues that the objections to the Magistrate Judge's Report and Recommendation present, and being otherwise fully advised in the premises, it is

ADJUDGED that United States Magistrate Judge Andrea M. Simonton's Report and Recommendation (D.E. No. 158) on March 21, 2006 is AFFIRMED and ADOPTED.

Accordingly, it is

ADJUDGED that:

(1) Defendant's Motion for Summary Judgment (D.E. No.

122), filed on January 17, 2006, is GRANTED.

(2) Plaintiff's Amended Motion for Summary Judgment

(D.E. No. 126), filed on January 18, 2006, is DENIED.

(3) All other pending motions in this case are DENIED

AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 10 day of April, 2006

/S/
FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

Copies provided to:

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Richmond Heights, Florida 33176

Aloyma M. Sanchez, AUSA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 04-22267-CIV-MORENO/SIMONTON

OMAR OSAHAR,

Plaintiff,

v.

JOHN POTTER, Postmaster General,

Defendant.
_____/

REPORT AND RECOMMEDATION RE: MOTIONS FOR SUMMARY JUDGMENT

Presently pending before the Court are Defendant's Motion for Summary judgment (DE # 122, filed 1/17/06) and Plaintiff's Amended Motion for Summary Judgment (DE # 126, filed 1/18/06). This case is referred to the undersigned Magistrate Judge for all pretrial proceedings (DE # 77). The motions are fully briefed (DE ##120, 131, 132, 133, 135,136,137). For the reasons stated below, it is recommended that Defendant's Motion for Summary Judgment be granted and that Plaintiff's Amended Motion for Summary Judgment be denied.

I. Introduction

Plaintiff Omar Osahar (hereafter "Osahar"), is proceeding under his 2nd Corrected Final Complaint (hereafter Final Complaint), against Defendant John Potter in his capacity as Postmaster General of the United States Postal Service (hereafter referred to as "Defendant") (DE # 30). In his Final Complaint, Osahar alleges a loss of liberty given to senior employees in an agency with a seniority system and training policy in violation of the equal protection clause of the Fifth Amendment; and violation fo individual contracts concerning fairness in employment with the agency and laws of the State of Florida in violation of the equal protection clause of the Fifth Amendment (DE # 30 at 11). Osahar also contends that he has filed this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq. (DE # 30 at 2, ¶2). Osahar further contends that this Court has jurisdiction over his claims pursuant to 42 U.S.C. §§ 1981, 1983; the equal protection clause of the Fifth Amendment; and the Labor Management Relations Act, 28 U.S.C. §1367(a) and 29 U.S.C. §185 (DE # 30 at 2-4, ¶¶2-4).[1]

Osahar alleges that he has commenced this action under Agency Complaints: 1-H-331-0024-04 (hereafter 24-04), 1-H-331-0036-03(hereafter 36-03), 1-H-331-0007-04(hereafter 07-04), 1-H-331-0013-02 (hereafter 13-02), 1-H-331-0027-03(hereafter 27-03), 1-H-331-0059-02(hereafter 59-02); 1-H-331-0041-04

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[1] Although Plaintiff asserts jurisdiction pursuant to the Labor Management Relations Act, the Complaint contains no facts regarding a violation of this Act (DE # 30).

(hereafter 41-04)[2]; and 1-H-331-0049-04), all of which have been pending for over six months without a final agency determination (DE # 30 at 5-9, ¶¶10-19).[3]

In his Final Complaint, Osahar alleges initially that he is an African-American who is employed by the United States Postal Service and who has engaged in protected activity (DE # 30 at 4, ¶5). Osahar states that he [h]was been employed by the Postal Service since 1974, and that from the early 1980's he has held the job title of electronics technician (DE # 30 at 4, ¶7). Osahar states that he previously prevailed in two discrimination suits he brought against Defendant, and that due to this, race discrimination and retaliation against him have continued, which has compelled him to file EEOC Complaints due to disparate treatment, disparate impact and a hostile work environment is a continuing offense (DE # 30 at 5, ¶¶ 8-9).

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[2] The parties entered into a stipulation that this Agency Complaint Number is actually 1H 331 0041 04, not 1H 3310041 03 as stated in the Final Complaint (DE # 122 at 4, fn. 4).

[3] The Complaint does not attach the relevant EEO Complaints; nor does record in this case does include them all. The records contains various portions of the investigative file with respect to Complaints # 36-03 (DE # 76 at Ex. 64); DE # 78 at Ex. 82); # 41-04 (DE # 24 at Ex. I; DE # 107 at Ex. 233, Ex. 234); DE # 131 at Ex. 8); and # 49-04 (DE # 27 at Ex. J; DE # 78 at Ex. 65, Ex. 69, Ex. 70, Ex. 71, Ex. 90, Ex. 116; DE 107 at Ex. 17, Ex. 69).

Osahar then alleges the following facts to support his claims, which he groups according to his relevant agency complaint. The events alleged in the Complaint occurred between October 2001 and August 2004. They have been arranged in chronological order below. In this Report, the agency complaint numbers are referred to by the last four digits of the number.

On or about October 22-23, 2001, a junior white electronics technician, instead of Osahar, was allowed to make primary software loads, which encouraged co-workers to disrespect Osahar (# 13-02) (DE # 30 at ¶13).

On or about May 21, 2002, as part of a continuous and systematic policy of retaliation and discrimination, a) Osahar's blue roll around tool box was broken into on several occasions, b) Supervisor Robert Cole took Osahar's camera away from him when Osahar tried to take pictures of harassment, even though Supervisor James Burney and others were allowed to use cameras on the work room floor, c) tasks which Osahar preferred were shifted to Tour 1 which affected overtime pay; d) disrespect was encouraged by unfairness in assignment and task; e) on or about May 29, 2002, Supervisor Robert Cole told Osahar that Osahar could not do a certain task and controlled Osahar's tasks to restrict Osahar's involvement in certain procedures and f) continuous harassment on the work room floor (# 59-02) (DE # 30 at ¶15).

On or about November 16, 2002, a) Osahar was decertified on powered industrial equipment because Supervisor Robert Cole and other management officials scheduled Osahar to go to training on the day after his last day of certification, making Osahar lose privileges or have his privileges suspended, b) the Postal Service was arbitrary and capricious in overtime rotation, by coordinating the task to give junior white and Hispanic employees the advantage, which deprived Osahar of his seniority rights (# 27-03) (DE # 30 at ¶14).

On or about December 3-9, 2002 and January 9-10, 2003, Osahar was systematically bypassed or told that he could not work sixth day overtime (# 36-03) (DE # 30 at¶11).

On or about December 3-9, 2003 through October 28, 2003, Osahar was a) not selected for certain training, b) not given an award for work performed where he had done most of the work and others received the awards and c) was restricted from certain work assignments (# 07-04) (DE # 30 at ¶12).

On December 31, 2003, a) a co-worker was allowed to use two time cards, b) a co-worker was allowed access to lockout cabinets when Osahar was not allowed access, c) two co-workers blocked/delayed Osahar's access to his assigned task; d) Osahar's tool box was pushed out of his assigned area, e) other created an unwanted appearance in Osahar's work area and f) another co-worker has

been allowed to perform certain work which has given Osahar limited experience in that area of work (# 24-04) (DE # 30 at ¶10).

From August 23-26, 2004, Osahar suffered from a) unfairness, retaliation and discrimination in training and overtime, by not being selected for two Network Cabling training courses (32601-39 and 32601-40), b) the arbitrary and capricious use of training seniority qualification and safety in the use of assignments, overtime and promotions, and c) discrimination by encouraging disrespect by unfairness in assignments, overtime, terms and Conditions of employment and loss of liberty of the equal protection of the law related to seniority and qualifications (# 41-04)(DE # 30 at ¶ 16).

At an unspecified time, Osahar suffered a "loss of the liberty of seniority in the selection process" when he was not selected for a training course for Basic Programming of Allen-Bradley PLCS (#55602-30) (# 49-04) (DE # 30 at ¶19). Documents and depositions filed in connection with the pending motions for summary judgment make it clear that the training occurred between October 4-8, 2004, and that the date of selection for this training was July 30, 2004 (DE #131, Giambrone Depo. at Ex. 2)[.]

Osahar also alleges that due to the previously cited EEO cases, Defendant has breached individual settlement contracts with Osahar dated December 12, 1989 and June 2, 1992 (DE # 30 at 10, ¶24 and Ex. K and ex. L).

Although Osahar has combined his claims into one count, an examination of these claims reveals that he is essentially claiming (1) disparate treatment in that he was subjected to racial discrimination based on specific adverse actions; (2) he was subjected to a hostile work environment based on race; (3) he was subjected to retaliation based on his prior EEO complaints; and (4) Defendant breached two settlement agreements reached in connection with prior EEO complaints.

Osahar seeks: 1) a declaration that he has suffered acts of discrimination at the hands of Defendant; 2) damages, back pay, prejudgment interest and lost benefits; 3) compensatory damages for pain, suffering and humiliation; 4) punitive, equitable and injunctive relief including training and overtime opportunities; 5) costs; and 6) any other relief that is just and equitable (DE # 30 at 11-12).

Defendant has filed an Answer to this Complaint, in which it admits that the formal complaints of discrimination were filed, and that Osahar is an employee of Defendant, but denies the substantive allegations (DE # 44). As affirmative defenses, Defendant alleges that Osahar has failed to comply with the statute of limitations contained in Title VII of the Civil Rights Act with regard to "some" of the allegations; that Osahar has failed to timely exhaust mandatory administrative remedies with regard to "most" of the allegations; that Osahar is not entitled to punitive damages; that Osahar fails to state a claim against the United States; that any adverse employment actions were based upon legitimate,

non-discriminatory reasons; that Defendant exercised reasonable care to prevent and promptly correct any allegedly improper behavior, that Osahar unreasonably failed to take advantage of any preventive or corrective opportunities; and that Osahar is not entitled to injunctive relief.

The instant motions followed.

II. Statement of Facts

Since the undersigned is recommending that summary judgment be granted in favor of Defendant, these facts are based upon the evidence as viewed in the light most favorable to Osahar. At the outset, the undersigned notes that each of the specific incidents alleged in the Complaint and described above are supported by Osahar's testimony at his deposition, and in his sworn Declaration; therefore, unless indicated below, those allegations are taken as true with respect to the occurrence of the events.

A. Background

Osahar has been employed by the United States Postal Service since 1974 (Osahar Depo. at 8)[4]. At all times relevant to this litigation, he has held the position of Electronics Technician, and has been assigned to work on Tour 2, which is the tour of

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[4] Osahar's deposition is contained in DE # 120. Osahar has also filed a sworn Declaration which is contained in DE # 127.

duty from 6:30 a.m. to 3:00 p.m., five days a week (Osahar Depo. at 8-9; Cole Declaration[5] at ¶ 11). At all relevant times, his days off have been Sunday and Monday, and therefore these are the days he is eligible to work a sixth day for overtime compensation. Tour 2 is the preventive maintenance tour and the electronic technicians on this Tour perform the cleaning, preparation and testing of all postal equipment. Daily assignments are made based on the needs of the United States Postal Service ("USPS") and the maintenance requirement of each individual piece of equipment (Osahar Depo. at 12-13; Cole Declaration at ¶ 17). The particular work assignment given to an electronics technician on Tour 2 during the eight-hour work day does not affect the technician's wages, job title, seniority or other employment benefits (Cole Declarationn at ¶ 22).

Robert Cole has been Plaintiff's immediate supervisor from approximately late 2000 to the present (Osahar Depo. at 13014; Cole Declaration ¶¶ 4-5). Cole was supervised by DeWayne Wilkie, and Wilkie was supervised by Joseph Giambrone (Giambrone Depo. at 77-78).[6]

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[5] This Declaration of Robert Cole, Plaintiff's immediate supervisor, is attached at DE # 124. The record also contains additional sworn statements of Cole and Cole's deposition.
[6] The deposition of Joseph Giambrone, who was the Manager two levels above Osahar at the Miami Postal Facility, is contained in DE # 131.

On November 16, 2002, Osahar's position was upgraded from a level 9 to a level 10; and on November 29, 2003, his position was upgraded from a level 10 to a level 11 (Osahar Depo. at 10-11; Declaration of Marija Weinman,[7] ¶¶ 4-5). Osahar is number three on the seniority list, and he has seniority over all of the co-workers about whom he complains in this case (Giambrone Depo. at 27 and Ex. 3).

The wages, hours and working conditions of Postal Service maintenance craft employees such as Osahar are governed by Article 38 of the collective bargaining agreement in effect between the American Postal Workers Union and the Postal Service to determine daily tasks and assignments. The Agreement requires that all training opportunities in levels 1 through 7 be offered first to the senior qualified volunteer within the occupational group, level and tour where the need for the skills exists. Job related training in levels 8, 9, and 10 also must be selected from volunteers within the occupational group, level and tour where the need for the skills exists, except that the employer may choose not to select a volunteer who has attended training for 6 or more weeks during the previous 12 months. Job related training in levels 8, 9, and 10 is not subject to seniority. The Agreement contains no provision with respect to selection for training for persons above level 10 (DE # 127, Ex.252; Cole Declaration at ¶¶ 13-20).

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[7] The Declaration of Marija Weinman, USPS Human Relations Specialist, is contained in DE # 124).

During the time period covered by this Complaint, Osahar has not been suspended, nor has he lost any pay or benenfits (Osahar Depo. at 14-16).

B. Prior EEO Activity

It is undisputed that prior to and during the time of the events alleged in this Complaint, Osahar had filed formal complaints of discrimination, and that his supervisors were aware of this. Settlement Agreements were reached in Case No. 3-S-1006-90 (DE # 30, Final Complaint Ex. K) and Case No. 3-S-1914-92 (DE # 30, Final Complaint Ex. L). The first settlement agreement, which was executed on December 12, 1989, states that Osahar "will have the same opportunities as other E.T.'s to work on equipment and do file updating and software changes. Complainant is to be provided the same training and have access to information and procedures regarding file updating and software changes as other ET's. The complainant is to be treated equally and fairly as other employees. He will be treated the same as Mr. Foland and Mr. Aquilino on learning and working PSDS II. He will be given same opportunity to become proficient as other employees. Based on merit, Mr. Osahar will be granted awards as all other ET's Specifically if Bob Foland and Mr. Aquilino receive awards for installation of PSDS System, since I also worked on the system I receive the same award in relationship to this process" (DE # 127, Ex. 290).

The second settlement agreement, which was executed on June 2,1992, states, "I will be given the opportunity to work in other areas as all other employees and be given the chance to advance in skills for upward mobility. In the future I will be allowed to receive the opportunity to go to seminars and train other ET's in new systems. That I'm treated and paid equal as other employees. Any and all special assignments be [undecipherable] all interested ET's. Schedule meeting and to abide by this and all other EEO Settlements [including] 3-S-1006-90 and 3-S-1157-91[undecipherable]" (DE # 127, Ex. 289).

These agreements provide that if the agency fails to abide by the agreements, the U.S. Postal Service will, "upon the complainant's written request, reinstitute the counseling process." (DE # 127, Ex. ## 289, 290).

In addition, Osahar prevailed in this Court in 1986 in Case No. 84-1782-CIV-ARONOVITZ, on a Complaint he filed against the Postal Service alleging discrimination (DE # 13 at Ex. A).

Osahar prevailed again in a case he filed in 1995, which alleged racial discrimination and retaliation. Case No. 95-753-CIV-LENARD. On September 25, 2001, the Court entered Judgment in the amount of $5,000.00, based upon the jury's verdict.

On July 6, 2002, Osahar filed another employment discrimination case against the Postal

Service, based on twelve EEO Complaints of activities that occurred between 1995 and 2001, including hostile work environment and denial of training claims, in Case No. 02-22227-CIV-MARTIZEZ. Summary Judgment was granted in favor of the Postal Service on February 19, 2004 (DE # 101).

C. Training

On June 15, 2004, there were two memoranda issued which solicited applications from persons interested in attending training courses # 32601-39, Offering 011 and # 32601-40, Offering 09 (Giambrone Depo. at 18-25 and Comp. Ex. ## 2, 3). These courses were, respectively, Network Cabling Copper Based System Tier 2, which was scheduled for August 9-13, 2004; and Network Cabling Fiber Based Systems Tier 3, which was scheduled for August 23-26, 2004(id). Course 39 was not a prerequisite for Course 40, but a review of the course description states that both courses were necessary to receive a Network Cabling Specialist certification (Giambrone Depo. Comp. Ex. 3). Three persons applied for these training courses-Omar Osahar, Oscar Sosa and D. Sotolongo. Oscar Sosa was selected by Robert Cole to attend both of them.

Oscar Sosa is a white Hispanic male who is junior in seniority to Osahar. Robert Cole made the selection, and it was approved by Joseph Giambrone (Giambrone Depo. at 20; Cole Declaration at ¶ 29). Cole averred in his Declaration that the reason for selecting Sosa was that he needed somebody who

was trained on the Tray Management System to be trained with respect to network cabling (Cole Declaration, ¶ 29). A more detailed reason was provided in Cole's Affidavit in response to the EEO Complaint (DE # 78, Ex. 116): "The Miami plant has a machine called TMS (tray management system) which transports all mail in the facility to other processing equipment. For about five months the TMS system has been frequently dropping out of service and causing delays. The TMS trained E.T.'s have been working on the problem but feel the problem is in the fiber-optic cabling running throughout the system but none of them are trained on trouble shooting or repairing these fiber-optic cables. Because it was in the best needs of the service to have a TMS trained employee with the cabling training, I chose Mr. Sosa because Mr. Osahar is not TMS trained." Oscar Sosa received formal TMS training, as well as on the job training in his work assignments (Sosa Declaration at ¶ 4;[8] DE # 127, Ex. 263 (Sosa's training record)).[9] It is undisputed that Osahar is not TMS trained.

On July 13, 2004, a memorandum was issued requesting volunteers to attend a training course

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[8] The Declaration of Oscar Sosa is attached as Ex. B to DE # 135).

[9] Osahar claims that there is a material issue of fact regarding whether Sosa is TMS trained. However, his assertion is not based on personal knowledge, and it is conclusively refuted bhy the evidence in the record, including the Declaration of Sosa. Moreover, Osahar has not attempted to dispute the fact that Sosa's job duties include the TMS machine and that Osahar's job duties do not.

entitled, "Basic Programming of Allen-Bradley PLCs, Course 55602-30 (Offering 001), which was scheduled for October 4-8, 2004 (Giambrone Depo., Comp. Ex. C). There were seven applicants—Omar Osahar, M. Denis (white male), G. Acker (white male), D. Ewing (black male), D. Sotolongo (white Hispanic male), J. Mims (white male), and Julio Fojo (white Hispanic male). Julio Fojo was selected to attend. Since Robert Cole was on vacation at the time the selection was made, DeWayne Wilkie made the selection, and Cole concurred in the selection when he returned from vacation (Cole Depo. at 32-33).[10] In his Affidavit in response to the EEO complaint, Wilkie avers that Fojo was selected because while Fojo was trained to service the TMS system which
Utilizes the Allen-Bradley PLCs, Fojo was not actually trained on the Allen-Bradley PLCs (DE # 78, ex. # 69). In his response, Cole avers that Wilkie advised him of the above selection, and that Cole concurred. Coles also states that Osahar had previously attended RCS training which included the Allen-Bradley PLC training. When Cole discussed this with Osahar, Osahar acknowledged that he had received this training and that he was trained on the Allen-Bradley PLC, but that this was a different course number (DE # 78, Ex. 65).

The acronym "PLC" stands for "programmable logic controller." A PLC is a computerized device that runs the tray management system ("TMS") machine. The machine is manufactured by two

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[10] The Deposition of Robert Cole is contained in DE # 107.

companies—Allen Bradley and Horner Electric. At the Miami Postal facility, the TMS machine is run by a Horner Electric brand PLC, but the only training offered is by Allen Bradley; however the PLC system is the same regardless of the manufacturer (DE # 135, Ex. A (Cole Declaration)).

When the Allen Bradley Basic Programming PLC training was offered on three later occasions, Osahar did not volunteer and three other persons, including Mike Denis, were selected to attend this training (2nd Cole Declaration at¶ 4).[11] Mike Denis had previously attended the RCS maintenance training (DE # 127, Ex. 267 (Training record for Mike Denis). There is no evidence that anyone who had not previously attended the RCS maintenance training volunteered for this course offering, or even who, other than the selected, applied.

On November 24, 2004, a Memorandum was issued directing certain persons to attend the Biohazard Detection System Training ("BDS") (DE # 127, Ex. #286). Training was scheduled for November 20, 2004, between 5 a.m. and 1: 30 p.m. for six employees, including Osahar. Five of those six employees –Sotolongo, Owens, Fleming, Denis and Osahar—had not volunteered and were drafted for the training. The training was scheduled for an additional six employees on December 1, 2004, between 1 p.m and 9:30 p.m. Five of those six employees had not volunteered and were drafted (id.). The Biohazard Detection System provides

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[11] Robert Cole submitted a second Declaration, which is attached as Ex. A. to Defendant's Response to Plaintiff's Amended Motion for Summary Judgment (DE # 135).

continuous monitoring of mail received at United States Postal Service facilities to ensure the safety of the mail. The system collects the air as mail is processed on the canceller system, and tests that air for biohazards. If a contaminant, such as anthrax, is detected, the system triggers and evacuation alarm. (DE # 136, Ex. B).

Records of Employee Training through December 29, 2005 were submitted for employees Omar Osahar, Mike Denis, Oscar Sosa, Julio Fojo, and other employees assigned to Tour 2 (DE # 127, Exs. ## 261-272). These records demonstrate that the Postal Service provides a significant number of training courses throughout the year. For example, Osahar has attended 60 training courses between August 1982 and October 2005; 9 of which were during the time between 2001 and 2004; and 7 of which were in 2005 (DE # 127, Ex. 269). Denis has attended 49 training courses between September 1990 and June 2005; 4 of which were during the time between 2001 and 2004; and 3 of which were 2005 (DE # 127, Ex.267). Sosa has attended 52 training courses between January 1987 and June 2005; 10 of which were between 2001 and 2004; and 2 of which were in 2005 (DE # 127, Ex. 263). Fojo has attended 50 training courses between June 1989 and October 2005; 7 of which were between 2001 and 2004; and 6 of which were inn 2005.

D. Overtime

Overtime is assigned on an "as needed" basis, in accordance with the following procedure. At the beginning of each quarter, with respect to each Tour,

a list is posted with all the names of the electronic technicians. Each employee then initials the list to indicated whether or not they would like to be considered for overtime. Based upon these responses, the Overtime Desired List (OTDL) is created and posted by seniority. Thereafter, if there is a need for overtime arises on a particular day and Tour, upper level management looks at the list to determine which employees are off on that day, and therefore available to be called in to work a "sixth day " as overtime. From that group, management looks to see which of those employees has the skills and/or certifications required for the overtime job at issue. From the group of available, qualified employees, the person who is next on the overtime rotation list is selected. Once a person works a sixth day of overtime, that person's name goes to the bottom of the list. (Cole Declaration at ¶¶ 35-36).

In his Affidavit filed in support of his administrative EEO Complaint, Osahar averred that during the week before December 9, 2002, he was Bypassed for his Monday of overtime by junior white and/or Hispanic electronic technicians; and, a few weeks later Mike Denis was brought in on overtime to work on the AFCS on or about January 9, 2003 (DE # 78 at Ex. 82, Affidavit A). The records provided for pay period 26-2, which appears to cover the week before December 9, 2002, reflect that nobody worked a 6th day of overtime on that Monday (DE # 76 at Ex. 64, p. 131). In addition, the records reflect that nobody worked overtime on the Monday in the preceding pay period (DE # 76 at Ex. 64, p. 130).

With respect to Osahar's claim of overtime deprivation during January 2003, a review of the overtime records reflects that Osahar worked his 6th day of overtime during the first week of pay period two, which appears to cover the beginning of January 2003. However, the portion of the overtime records that have been filed in this case do not specify who worked a 6th day of overtime during the second week of pay period two, which would include January 9th and 10th. The "bulk" time records provided for the years 2000 through 2005 list total overtime per employee per pay period, and do not designate the specific dates of overtime worked nor whether overtime listed for a particular pay period was based on the 6th day overtime rotation rather than an accumulation of hours worked past the normal eight-hour workday.

The absence of these records is not material, however, since in his Affidavit in support of his EEO Complaint, with respect to the alleged January deprivation of overtime, Osahar specifically complains about Mike Denis being brought in to work on the AFCS machine, and it is undisputed that Mike Denis does not have the same days off as Osahar, and thus Osahar and Denis would never be in competition for the same 6th day overtime work.

When asked at his deposition to explain his claim regarding the opportunity to work a 6th day of overtime, Osahar could not provide any specific information. The following excerpt from his deposition is his explanation regarding this claim:

A: [W]hat I'm saying is on or before December the 3rd through the 9th, 2002, and between, I

guess January 9th through 10th, 2003, I was systematically bypassed or told that ... I could not work my 6th day of overtime.

Q: Were any overtime opportunities given to you during that period of time, that is December 3rd through the 9th . January 9th through the 10th?

A: I am not sure. This mentions 6th. The 6th day, which is one of my days off. If doesn't mention all overtime. It only mentions just the sixth, working my sixth day.

Q: Now, who worked overtime instead of you during-within what's contained in paragraph 11 of your Second Corrected Final Amended Complaint? Who worked overtime instead of You?

A: Some of the junior ET's on tour 2.

Q: Okay. And who would the junior ETs on tour 2 be? ... You can refer to the document that I Gave you if it will help refresh your recollection. That is Government Exhibit No. 3, sir.

A: Okay. One of them appear to be Mike Denis.

Q: Okay. Who else?

A: I'm not sure, but there's other ETs. I don't have them listed. I would have to check the records. I'm not sure, but I have Mike Denis listed here. Who he has different days off, but when you look at it, at a weekly or quarterly basis, the overtime could be shifted during these days.

Q: I see that in the affidavit that is Government Exhibit No. 3, at the bottom is says affidavit B, page 15, it says Julio Fojo. Is he also an individual that was allowed to get overtime instead of you?

A: Okay. Again, this is a statement by Dwayne Wilkie, the manager. He is above Robert Cole. It's dated 5/28/03. And he mentions three employees, Mike Denis, George Zirini and Julio Fojo. I assume, as having –having work Overtime but do not have the days off that I Have.

(Osahar Depo. at 114-17).

With respect to Osahar complaint 27-03, in which he asserts unfairness in the overtime rotation during the period of time which includes November 16, 2002, Osahar provided the following details during his deposition:

A: Well, I mean during this particular period of time, not just on 11/16/02, but probably within 45 days of this period they were not rotating on a seniority basis with overtime. And what I meant by that, again, as a senior man- the senior man based on the collective Bargaining Agreement ... seniority is supposed to be rotated ... on a quarterly basis or by seniority. And it wasn't being done.

You see situations ...where you see the junior employee having more overtime than the senior employee. And a lot of times this might be African-American, he might be

> working maybe two hours every day, where I prefer to get my overtime on my sixth day.

(Osahar Depo. at 179).

When asked specifically which individuals received overtime when Osahar did not receive overtime, Osahar identified Osahar Sosa, Mike Denis, Robert Williams, and "possibly some other people" (Osahar Depo. at 201). Robert Williams is a junior Aftrican-American electronic technician (Osahar Depo. at 201).

Osahar has not pointed to any place in the record, however, which specifically identifies a day on which he was available to work a sixth day of overtime and he was wrongfully deprived of that opportunity by the actions of the Defendant in assigning that day to somebody else. The overtime records submitted are voluminous, and despite the lack of guidance by Osahar and Defendant regarding the interpretation and analysis of these records, they have been examined by the undersigned Magistrate Judge. From this review, the undersigned has been unable to discern any occasion where Osahar did not receive a sixth day of overtime to which he was entitled, or that junior employees received more sixth days of overtime than Osahar on Sundays and Mondays (Osahar's days off). For example, examining the overtime reports for Sundays and Mondays from pay period 22-1 in 2002 through pay period 2-1 2003 (which apparently comprises all pay periods during the fourth quarter of 2002, and the entire period of the claimed overtime deprivations in # 27-03 and

and 36-03), Osahar worked his sixth day of overtime on 7 days; Sosa worked his sixth day of overtime on 6 days, and Williams worked his 6th day of overtime on 5 days (DE # 76 at Ex. 64, pp. 123-34). These were the only employees who worked a 6th day of overtime on Tour 2 during this quarter.

III. The Cross-Motions For Summary Judgment

For purposes of this Report and Recommendation, the undersigned has considered all the arguments and supporting evidence in the record as a whole, without regard to whether the evidence was cited in connection with the Defendant's Motion for Summary Judgment or Osahar's Motion for Summary Judgment.

A. Defendant's Position

Initially, Defendant contends that Osahar's disparate treatment claims cannot survive summary judgment because he cannot establish that 1) he suffered adverse employment actions (DE # 122 at 7-15, DE # 136 at 6, 7-10); 2) similarly situated employees outside of his protected group were treated more favorably (DE # 122 at 7, 15-17, DE # 136 at 5-7); and 3) Defendant's legitimate non-discriminatory reasons were a pretext for race discrimination against him (DE # 122 at 7, 20-23; DE # 136 at 6).

Defendant also contends that Osahar's retaliation allegations cannot survive summary judgment because he cannot establish that 1) he suffered adverse employment actions (DE # 122 at 7-15, 17-20, DE # 136 at 6, 7-10) and 2) Defendant's

legitimate non-discriminatory reasons were a pretext for race discrimination against him (DE # 122 at 7, 20-23).

Defendant asserts that the record contains no evidence of racial epithets, threats, intimidation or any evidence that Osahar's workplace was abusive; and that, at most, Osahar presents evidence of sporadic incidents to which he took affront, which do not meet the requirement that blatant forms of harassment were so pervasive and severe to alter the conditions of Osahar's employment (DE # 122 at 4). Thus, Defendant contends that Osahar's hostile work environment allegations cannot survive summary judgment because they are 1) premised on Osahar's disparate treatment and retaliation claims (DE # 122 at 23); and 2) the harassing acts alleged by Osahar are not sufficiently pervasive or severe to alter the conditions of Osahar's employment (DE # 122 at 23-25; DE # 136 at 8-9). Defendant also asserts that Osahar cannot rely on harassing acts which occurred before the period covered by the Final Complaint, which began approximately in October 2001 (DE # 136 at 8).[12]

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[12] The undersigned rejects Defendant's contention that acts which occurred prior to the period covered in the Complaint cannot be used as evidence to support a hostile work environment claim. The analysis provided by the United States Supreme Court in National R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002), is instructive:

> In determining whether an actionable hostile work environment claim exists, we look to "all the circumstances" including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating,

Finally, with respect to Osahar's claim for alleged breach of contract, Defendant contends that Osahar has failed to exhaust his administrative remedies, which bars his claim (DE # 122 at 5). Defendant argues that the settlement agreement state that in the event of a breach, Osahar must file a written request either to reinstate the settled complaint for further processing from the point at which processing ceased under the terms of the settlement agreement, or to reinstate the counseling process. Further, the EEOC regulations required Osahar, within 30 days of when he knew or should have known of the alleged noncompliance, to notify the EEO director, in writing of the alleged noncompliance. Defendant concludes that since Osahar failed to perform the required acts, he failed to exhaust his administrative remedies for the alleged breaches of settlement agreements, and this Court, therefore, has no jurisdiction over those claims (DE # 122 at 5, 25-27, DE # 136 at 4-5).

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or a mere offensive utterance; and whether it unreasonably interferes with and employee's work performance. " ...A hostile work environment claim is comprised of a series of separate acts that collectively constitute one "unlawful employment practice." 42 U.S.C. § 2000e-5(e)(1). The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter, for purposes of the statute, that some of the components acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filling period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability.536 U.S. at 116-17.

In response to Osahar's contention in his response that he may bring claims against Defendant under the Fifth and Fourteenth Amendment, pursuant to 42 U.S.C. §§ 1981 and 1983, Defendant asserts that this Court lacks jurisdiction over these claims because Defendant is an official of the United States acting in his official capacity, and the United States has not waived sovereign immunity as to this suit (DE # 136 at 1-2). Defendant also asserts that Plaintiff may not assert a claim under §1983, because that section applies only to violations of federal or constitutional rights under the color of state law (DE # 136 at 2). Defendant contends that Osahar's exclusive remedy for his discrimination claims related to his employment is Title VII (DE # 136 at 2).

In response to Osahar's contention in his reponse that he need not exhaust administrative remedies to bring his claim alleging unfair representation by his Union, pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, Defendant asserts that this claim goes beyond the relief which Osahar requested in his Final Complaint (DE # 136 at 2-3). Defendant also asserts that the Union's decision not to take to arbitration Osahar's grievances regarding the denial of training was not irrational, as Defendant had legitimate, non-discriminatory reasons for not selecting Osahar for the requested training (DE # 136 at 3-4).

B. Osahar's Position

Osahar contends that he has suffered adverse employment actions in that Defendant has ignored Osahar's seniority when: 1) selecting employees for

training; 2:making the worst assignments part of Osahar's normal daily assignments; 3) selecting employees for overtime, and 4) denying Osahar promotion in 1991 (DE # 133 at 2-3, 7,11-15, 17-18).

Osahar further contends that he was subject to disparate treatment based on race involving the selection for training, and when Defendant allowed another less-senior, white employee to use two time cards (DE # 133 at 7, 10-11, 15-16, 18,20-21).

Osahar also states that he has experience racial epithets, threats, and intimidation as indicated in a prior employment case which he filed in 1995 (DE # 133 at 3). Osahar contends that his blue tool box was broken into, he was not allowed to use a camera on the work floor to take pictures of harassment, and that others created an unwanted appearance of Osahar's work area (DE # 133 at 16-17). He also contends that a white employee told another black employee that the black employee could not come into a computer room (DE # 133 at 16).

Osahar further contends that he can establish a prima facie case of retaliation because he previously filed employment discrimination cases in this Court and subsequently lost "liberty of seniority", training and overtime, which establishes a causal connection between the participation in the protected activity and the adverse employment decision (DE # 133 at 18-19).

Osahar also alleges that all of Defendant's legitimate, non-discriminatory reasons for his actions were pretexts for employment discrimination and retaliation (DE # 133 at 19-21). To support his claim of pretext, Osahar relies on the past finding of

discrimination in his prior lawsuits, as well as on evidence which he claims discredits the proffered reasons for the actions taken.

Osahar further contends that he timely filed in this Court his Complaint alleging breaches of prior settlement agreements (DE # 133 at 3-5, 6, 21-22).

Osahar also alleges that his union unfairly withdrew Osahar's grievance regarding Defendant's selection of less senior employees for training courses (DE # 133 at 4-5).

Osahar argues that exhaustion of administrative remedies is not required for the claims he raises under 42 U.S.C. 1981, 1983 and 29 U.S.C. 185 (DE # 133 at 7-9, 22-23).

IV. The Relevant Legal Standands

A. The Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure authorizes entry of summary judgment where the pleadings and supporting materials show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Denney v. City of Albany*, 247 F.3d 1172, 1181 (11th Cir. 2001). Summary judgment is an integral part of the federal rules as a whole, which are designed to secure a just, speedy, and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The court's focus in reviewing a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or

whether is so one-sided that one party must prevail as matter of law." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). In assessing whether the movant has met its burden, the courts should view the evidence and all factual inferences therefor in the light most favorable to the party opposing the motion and all reasonable doubts about the facts should be resolved in favor of the non-movant. See *Denney v. City of Albany*, 247 F.3d at 1181.

The moving party has the burden to establish the absence of a genuine issue as to any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Allen v. Tyson Foods, Inc., 121 F.3d at 646. Once the moving party has established that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law, the burden shifts to the non-movant to come forward with a response setting forth "specific facts" showing that there is a genuine issue for trial. Thus, the party opposing summary judgment may not rest upon the mere allegations or denials of the pleadings, but must present sufficient evidence favoring the non-moving party for a jury to return a verdict in favor of that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249.

Conclusory allegations will not suffice to create a genuine issue of material facts. See *Leigh v. Warner Bros Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000). There must be more than a scintilla of evidence; there must be "substantial conflict in evidence to support a jury question." *Tidewell v. Carter Prods.*, 135 F.3d 1422, 1425 (11th Cir. 1998), quoting *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir 1989).

Ultimately, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Allen v. Tyson Foods*, 121 F.3d at 646; accord *Denney v. City of Albany*, 247 F.3d at 1181. "At the summary judgment stage, [the plaintiff] bears the burden of coming forward with sufficient evidence to create genuine issues of material fact regarding each of the[e] elements [of the prima facie case]." Harris v. H&W Contracting Co., 102 F.3d 516, 523 (11th Cir. 1996). A plaintiff's mere belief, speculation, or conclusion that he was subject to discrimination does not create an inference of discrimination or satisfy his burden. Coutu v. Martin County Bd. Of County Comm'rs, 47 F.3d 1068, 1074 (11th Cir. 1995).

B. Standard of Proof in a Title VII Case

Title VII prohibits discrimination in hiring, discharge, and promotion in employment on the basis of race, sex, or national origin. The Supreme Court has held that Title VII is intended to eradicate Not only economic and tangible discrimination, but the entire spectrum of disparate treatment, which included requiring people to work in a racially hostile or abusive environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986). However, not all employment practices are actionable under Title VII. See Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) ("the employment discrimination laws...cannot be transformed into a palliative for every workplace grievance, real or imagined..."), *cert. denied*, 475 U.S. 1082 (1986). Thus, Title VII is

not a shield against harsh treatment in the workplace, and does not require the employer to have good cause for its decisions. Nix v. WLCY Radio, 738 F.2d 1181, 1187 (11th Cir. 1984).

In an employment discrimination case, the plaintiff bears the ultimate burden of proving that the defendant intentionally discriminated against the plaintiff. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Because direct evidence of discrimination can be difficult to produce, the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), created a framework on the burden of production and order of presentation of proof to analyze circumstantial evidence of discrimination. Where, as here, there is 4plaintiff must produce sufficient evidence to support an inference that the defendant employer based its employment decision on an illegal criterion. "Williams v. Vitro Servs. Corp., 144 F.3d 1438,1441 (11th Cir. 1998). Under McDonnell Douglas, if the plaintiff creates an inference of discrimination by establishing a prima facie case, the burden then shifts to the defendant to articulate a legitimate, non-discriminatory reason for the employment action, and if it does, the defendant is entitled to summary judgment unless the plaintiff persuades the trier of fact that the defendant intentionally discriminated against the employee despite the defendant's proffered lawful reason for its employment decision. Walker v. Mortham, 158 F.3d 1177, 1193 (11th Cir. 1998), cert. denied, 528 U.S. 809 (1999). To satisfy this burden, the defendant need only produce evidence which would allow the

trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. at 257.

To prevail on a hostile environment claim, a plaintiff must show that the conduct he complains of "altered the condition of the workplace, creating an objectively abusive and hostile atmosphere." Edward v. Wallace Community College, 49 F.3d 1517, 1521 (11th Cir. 1995). Specifically, he must prove that: 1) he belongs to a protected group; 2) he was subject to "unwelcome" harassment; 3) the harassment was based on race; 4) the harassment affected a "term, condition, or privilege" of employment in that it "was sufficiently severe and pervasive to alter the condition of his employment and create an abusive working environment", and 5) the employer knew or should have known of the harassment and failed to take prompt remedial action. Prado v. L Luria & Son, Inc., 975 F.Supp. 1349, 1355 (S.D. Fla. 1997).

Title VII does not address generally offensive or unpleasant conduct. *Thevenin v. Baptist Health Systems of South Florida,* 931 F.Supp. 856, 859 (S.D. Fla. 1996). Title VII does not provide a cause of action for employees who are exposed to harassment that has no reference to race, sex or national origin. Brown v. Brown and Williamson Tobacco Corp., 1996 WL 325890 at *3 (N.D. Fla. Apr. 11, 1996), aff"d 111 F.3d 896 (11th Cir. 1997).

To determine whether a plaintiff's work environment was hostile or abusive, this Court should consider: 1) the frequency of the alleged discriminatory conduct; 2) the severity of the

conduct; 3) whether the conduct was physically threatening or humiliating, or a mere offensive utterance; and 4) whether the conduct unreasonably interfered with Plaintiff's work performance. Prado, 975 F.Supp. at 1355. Isolated Incidents of offensive acts, however, are not sufficient to establish a hostile work environment. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

C. Standard of Proof in a Retaliation Case

To establish a Title VII claim for retaliation, a plaintiff must show that: 1) he engaged in a statutorily protected activity; 2) an adverse employment action occurred; and 3) the adverse action was causally related to his protected activities. See *Little v. United Technologies*, 103 F.3d 956 (11th Cir. 1997); *Goldsmith v. City of Atmora*, 996 F.2d 1155, 1163 (11th Cir. 1993). To satisfy the causal connection requirement, a plaintiff must establish that his supervisor was actually aware of the protected expression at the time he allegedly took adverse employment action against the plaintiff. *Goldsmith*, 996 F.2d at 1163. Once a plaintiff establishes a prima facie case, a defendant must proffer a legitimate, non-discriminatory reason for the adverse employment action, *EEOC v. Reichhold Chemical, Inc.*, 988 F.2d 1564, 1571-72 (11th Cir. 1993). If a defendant offers legitimate reasons for the employment action, a plaintiff must then demonstrate that a defendant's proffered explanation was a pretext for retaliation. *Meeks*, 15 F.3d at 1021; *Goldsmith*, 996 F.2d at 1163.

V. Legal Analysis

A. Osahar Cannot Show Disparate Treatment Based on His Race

Osahar cannot establish a prima facie case of disparate treatment because he is unable to establish that 1) an adverse employment action was taken against him or 2) that similarly situated employees outside of the protected group were treated more favorably. The record also does not contain evidence that Defendant's legitimate, non-discriminatory reasons for the complained-of actions were a pretext for race discrimination.

1. Osahar Cannot Establish That He Suffered an Adverse Employment Action

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760-61 (1998), a Title VII sex discrimination case, the Supreme Court defined an adverse employment action as a significant change in employment status, such as hiring, firing, failing to promote reassignment with significantly different responsibilities, or a decision causing a significant change in benefits—an action which in most cases inflicts direct economic harm. In *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456-57 (11th Cir. 1998), the Eleventh Circuit held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. Id. at 1456-57. Thus, to establish adverse employment action under Title VII, Osahar must show a serious and material

change in the terms, conditions or privileges of his employment. See *Davis v. Town of Lake Park, Florida*, 245 F.3d 1232, 1242-43 (11th Cir. 2001) (where memo criticizing the plaintiff's job performance was removed from plaintiff's personnel file and there was no evidence that the memo affected the plaintiff's employment, the memo was not an adverse employment action). Moreover, the employment action must be materially adverse in the view of a reasonable person, and the employee's subjective view of the employer's action is not controlling. Id. at 1239. Indeed, the Eleventh Circuit has held that not all conduct that makes an employee unhappy or negatively affects an employee constitutes adverse employment action. Id. at 1238, 1242.

a. Osahar's Complaints Regarding His Work Assignments.

Osahar alleges with regard to work assignments that 1) on December 21, 2003, he did not receive a preferred assignment, in that another co-worker had been allowed to perform TACSWS-AMC (MODSS conveyor), which gave Osahar limited experience on that equipment (24-04); 2) on October 22-23, 2001, another, white employee with less seniority was allowed to load software instead of Osahar (13-02); on May 21, 2002, Osahar was not allowed to perform "Zebra card alignment" (59-02) and 4) Osahar was restricted from assignments relation to TACS and IPSS (07-04).

The record is clear that Osahar's seniority, job title, salary level and benefits have not been affected

by the daily assignments which he has received (DE # 124, January 12, 2006 Declaration of Robert Cole, at ¶¶21-23) (hereafter Cole Declaration). It is undisputed that on November 16, 2002, Osahar's classification was upgraded from a level 9 electronics technician to a level 10 electronics technician, and on November 29, 2003, Osahar's classification was upgraded from a level 10 electronics technician to a level 11 electronics technician (DE # 124, January 12, 2006 Declaration of Marija Weinman, at ¶9). Neither Osahar nor any of the other electronics technicians on Osahar's tour, Tour 2, are allowed to choose their work assignments (Cole Declaration at ¶¶14-17, 20). The electronics technicians on Tour 2 are paid the same regardless of their assignments on a specific 8 hour work day (Cole Declaration at ¶21). The electronics technicians on Tour 2 do not receive additional pay or any other employment benefit for performing a certain type of assignment or for working on a particular piece of equipment or machine during their 8 hour work day (Cole Declaration at¶¶21-22). The wages, jog titles, seniority and employment benefits of the electronics technicians on Tour 2 are not affected by their daily assignments (Cole Declaration at ¶¶21-23). At his deposition, Osahar admitted that he has never been suspended during the time period covered by his Final Complaint, and that he has never lost any pay, or benefits during that period, either (DE # 120, November 23, 2005 Osahar Deposition, at 14-16) (hereafter Osahar Deposition).

In addition, work assignments of the electronics technicians on Tour 2 are not based on the

employee's seniority. Article 38 of the National Agreement between Osahar's union and the Postal Service does not restrict the Postal Service's discretion in assigning daily tasks or rotations to its employees, there is no policy or procedure which requires daily work assignments to be based on seniority, and daily assignments are made based on the operational needs of the facility (Cole Declaration at ¶¶21-23). Finally, under Article 3 of the National Agreement, which employee is assigned to which system, on a day to day basis, is left to the discretion of the Postal Service (Cole Declaration at ¶¶12-14).

b. Osahar's Complaints Regarding Sixth Day Overtime

Osahar states that he was unfairly denied sixth day overtime while other employees with less seniority who were not members of the protected class received sixth day overtime (36-03 & 27-03). The Eleventh Circuit has held that, in certain instances, denial of a right to overtime may constitute an adverse employment action. See *Shannon v. BellSouth Telecomm.*, 292 F.3d 712, 716 (11th Cir. 2002) (a plaintiff who presented evidence that he was "totally blackballed" from overtime as retaliation established an adverse employment action); Bass v. Bd. of County Comm'rs, 256 F.3d 1095, 1118 (11th Cir. 2001) (the denial of overtime to the plaintiff, who showed that overtime was available to other, similarly situated employees, constituted an adverse employment action).

Osahar's supervisor Robert Cole provided a declaration which laid out the sixth day overtime

selection process. At the beginning of each quarter, specific to each tour, a list is posted with all the names of the electronics technicians. The list is posted so that each employee may indicate, by initialing yes or no, whether he would like to be considered for overtime. The Overtime Desired List (OTDL) is then created and is posted by seniority. The ODTL is posted by seniority to have a starting point in which to begin the overtime rotation. Thereafter, if a need for overtime hours presents itself on a certain day, upper level management first looks to see which employees are off on that day. From that group of employees, upper level management looks to see which of those employees has the skill certification which is needed for the overtime job in question on the sixth day overtime rotation. Once an individual is selected for overtime, he goes to the bottom of the list (Cole Declaration at ¶35).

Here, however, Osahar has not presented specific evidence that he was prevented from working sixth day overtime and how much overtime he was prevented from working. At best, Osahar made conclusory statements at his deposition that he was denied the ability to work overtime. In fact, at his deposition, Osahar admitted that he does not have the same days off as Mike Denis, George Zirini and Julio Fojo, three of the electronic technicians whom Osahar chose as his comparators. Osahar admitted that he could not have been selected for overtime instead of any of those three persons (Osahar Deposition, at 117-19). At his deposition, Osahar also claimed generally that Robert Willians, a less-senior

African-American, and Oscar Sosa, a less-senior Hispanic, received overtime when he did not (Osahar Deposition at 201). However, Osahar did not state on what days the alleged deprivation of overtime occurred, and also did not provide any evidence that he was available to work overtime on that day or days, that he possessed the skill certification needed for the overtime job in question, or that it was his turn in the rotation to work overtime.[13] He also did not establish that his failure to work overtime on any particular day adversely impacted his pay since, under the rotation system, if he was not selected for a particular overtime day he would remain on thelist for that quarter until he was selected[14].

Thus, the record contains no evidence that Osahar was unfairly denied sixth day overtime in favor of similarly situated electronic technicians not

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[13] The undersigned recognizes that some of these factors are relevant to the issue of whether there was a legitimate, non-discriminatory reason for the non-selection to work overtime; but under the circumstances of this case they are also relevant in the context of Plaintiff's failure to establish an actual deprivation.

[14] Although Osahar has provided a list entitled "Possible Overtime Lost of 6th Day of Overtime" in which he lists a number of days in various pay periods beginning with pay period 4 in the year 2000, through pay period 12 in the year 2005, he has not explained how he arrived at these "possibilities" most of which are outside the time period of this complaint; nor has he listed the specific dates, who was awarded the overtime on those dates, and how the overtime rotation policy was violated with respect to any of those dates (DE # 127 at Ex. 292). The undersigned notes that various other documents which purport to show overtime days have also been filed, and those documents have similar deficiencies.

in a protected class with less seniority. It is also undisputed that the there is no right, guarantee or entitlement to overtime under the union contract. See Cole Declaration, ¶33.

Therefore, on this record, Osahar has not presented evidence to support his claim that his alleged loss of potential overtime constituted an adverse employment action. Cf. Collins v. Miami-Dade County, 361 F. Supp.2d 1362, 1373 (S.D. Fla. 2005) (where a plaintiff did not show that her transfer actually prevented her from working any overtime, she did not establish that the loss of potential overtime constituted an adverse employment action).

c. Osahar's Complaints Regarding Failure To Be Selected For Training

Osahar alleges that: 1) during the period from September 28, 2003 through October 28, 2003, he was not selected for or granted training for WEBMOD for the MODSS system or the New MODSS system in the past (07-04); 2) he was decertified on powered industrial equipment because Supervisor Robert Cole and other management officials scheduled Osahar to go to training a day after his last day of certification (27-03); 3) he was not selected for training in two Network Cabling courses (41-04); and 4) he was not selected for Allen-Bradley PLCS training (49-04).

The Eleventh Circuit has recognized that failure to provide training may constitute an actionable adverse action "as long as the training is materially related to the employee's job responsibilities or possibilities for advancement." *Turlington v. Atlanta*

Gas Light Co., 135 F.3d 1428, 1436 n.16 (11th Cir. 1998). However, numerous courts have recognized that mere denial of a training course, standing alone, is not sufficient. See, e.g., *Bullock v. Widnall*, 953 F. Supp. 1461, 1473 (M.D. Ala. 1996). aff'd 149 F.3d 1196 (11th Cir. 1998) (non-selection for training courses was not an adverse action although Plaintiff "may very well have benefitted from attending ... and it may have been insulting to have his subordinate chosen to attend, he has not demonstrated that his non-selection adversely affected the terms or conditions of his employment"); *Merriweather* v. *Alabama Dept. of Public Safety*, 17 F. Sup. 2d 1260, 1270 (M.D. Ala. 1998) (non-selection for four training courses did not constitute adverse action where plaintiff "failed to show that her non-attendance at any of these courses affected or could affect her salary, chances of promotion, ability to perform her job, or any other aspect of her employment"); Madiedo v. Miami-Dade County, 2000 WL 1763845 at * 4 (S.D. Fla. 2000) (failure to provide training at earlier course not an adverse action where it did not affect her ability to do her job or her benefits); Harvey v. City of Bradenton, 2005 WL 3533155 at *5. (M.D. Fla. 2005) (denial of training not an adverse action where there was no evidence that such training was an important condition of employment nor that it affected Plaintiff's salary, title, position or job duties); McGuire v. Miami-Dade County, 2006 WL 375403 at *3 (S.D. Fla. 2006) (denial of training not an adverse action where denial did not cause any tangible harm").

There is no evidence in the record that as a result of not being selected for these courses, or in being briefly decertified on powered industrial equipment, Osahar either lost any seniority, or received a change in hours, benefits, wages or job title, or suffered any serious and material change to the terms and conditions of his employment (Osahar deposition at 145-46, 172-77, 253; Cole Declaration at ¶¶28, 30,37). Although denial of training in some circumstances could lead to a loss of potential overtime, there is nothing in the record to support Osahar's conclusion that he suffered or is likely to suffer any adverse consequences from the denial of these three training courses. There is no indication that any overtime possibilities would be linked to these courses, particularly since Osahar had received training regarding the Allen-Bradley PLC, and since he was not TMS trained, and had never sought TMS training. The speculative hypothetical possibility of lost overtime is insufficient to establish that the denial of training on these specific dates was an adverse action.

Moreover, as stated previously, the undisputed evidence established that Osahar, having attended 60 training courses, is one of the most trained electronic technicians at the Miami facility (Cole Declaration at ¶28; DE # 127, Ex. 269 (Osahar's training records).

d. Osahar's Complaints Regarding Failure to Be Promoted

Osahar claims in the Final Complaint that because he was not selected for certain training, he had not been promoted (DE # 30 at ¶17). However,

Osahar does not controvert that he has not applied for promotion during the relevant period at issue in his Final Complaint, 2001 through 2004. Indeed, in his response, Osahar appears to allege that he was not promoted in 1991 due to his failure to be selected for training in 2004. Since Osahar has not applied for a promotion during the period covered by the Final Complaint, his allegation is pure speculation and will not be considered. See *Davis v. Town of Lake Park*, 245 F.3d at 1239 (although Title VII does not require proof of direct economic consequences, the asserted impact cannot be speculative and must, at least, have a tangible adverse effect on the plaintiff's employment).

e. Osahar's Miscellaneous Complaints About Discriminatory Work Place Actions

In EEO Complaint 24-04, Osahar alleged that 1) management allowed a white co-worker with less seniority, Mike Denis, to use two time cards, which enabled Denis to clock in at another time card rack if Denis was late; 2) Osahar's red tool box was pushed out of Osahar's assigned area; 3) others created an "unwanted appearance of his work area" and 4) he was not allowed access to a lockout cabinet. The record contains no evidence that these alleged incidents caused an adverse employment action to Osahar, that is, that they affected in any way Osahar's seniority, wages, job title or benefits (Cole Declaration at ¶37). Indeed, Osahar admitted at his deposition that he was not sure if Denis having two time cards had affected Osahar's pay or had any

effect on Osahar's employment except for Osahar's "liberty of scheduling" and "liberty interest" (Osahar deposition at 33-37, 39-40). Similarly, Osahar admitted at his deposition that his lack of access to a lockout cabinet only affected his "loss of liberty interest" and his "seniority of liberty interest", and did not result in any discipline, suspension, monetary loss or change in working hours (Osahar deposition at 48-53). Moreover, it is undisputed that the cabinet in question was used to store coffee and coffee supplies that belonged to another employee.

In EEO Complaint 59-02, Osahar alleged that 1) his blue tool box was broken into; 2) he was not allowed to use a camera to take pictures of harassment while management was allowed to use cameras in the work place; and 3) there was continuous harassment in his work room. Again, the record contains no evidence that these alleged incidents caused an adverse employment action to Osahar, that is, that they affected in any way Osahar's seniority, wages, job title or benefits (Cole Declaration at ¶37).

For example, while employees are not allowed to bring photo or video cameras onto the work floor (Cole Declaration at ¶44), Osahar did not suffer an adverse employment action for attempting to bring a camera on the work floor. Similarly, even if Mike Denis had two time cards, Osahar has not shown that he suffered an adverse employment action for that reason. Osahar does not contend that he lost

pay, benefits or privileges for being late and that Denis did not (Osahar deposition at 33-40).[15] The Same is true for the other alleged incidents considered in this section. Osahar does not contend that he lost pay, benefits or privileges due because of them (Osahar deposition at 40-93, 105-07, 212-13, 217-18, 226, 234-35, 240).

In fact, even after Osahar filed the eight EEO Complaints that form the basis of this litigation, spanning the time frame from 2001 through 2004, Osahar was reclassified from a level 9 electronics technician to a level 10 electronics technician, and then to a level 11 electronics technician, and he also received a pay increase (Weinman Declaration, at ¶¶8, 9; Osahar deposition at 11).

Although Osahar claimed generally throughout his deposition that all of his Complaints regarding the workplace had affected his work assignments, training and overtime, he has not presented any facts to support these conclusory statements (See, e.g., Osahar Depo. at pp. 49-50 (access to coffee locker); 78 (toolbox being moved); 88-89 (unwanted appearance of work site); 104-06 (TACS MODSS assignment). Therefore, Defendant is entitled to summary judgment as to these allegations.

2. Osahar Cannot Show that Similarly Situated Employees Who Were Not In The Protected Class Were Treated More Favorable

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[15] At his deposition, Osahar stated that once he clocked in a little late, and that he believed this resulted in a discussion which was used to justify a letter of warning in the past, but he could not say when this occurred (Osahar deposition at 32-33).

To establish a prima facie case, Osahar must show that there were employees, not within his protected class, who were similarly situated in all relevant respects, but who were treated more favorably. See Walker v.Mortham,158 F. 3d at 1193; Holifield v. Reno, 115 F.3d at 1561. In determining whether employees were similarly situated and more favorably treated, this Court must consider whether the employees were treated in the same way as Osahar. The adequacy of the comparators is crucial. Marshall v. Western Grain Co., Inc., 838 F.2d 1165, 1168 (11th Cir.), cert. denied, 488 U.S. 852 (1988).

Here, Osahar has not shown that there were similarly-situated employees who were treated differently than he was. If Osahar cannot show there was a similarly situated employee, or that a similarly situated non-protected employee was not treated differently than Plaintiff, "summary judgment is appropriate where no other evidence of discrimination is present." Holifield v. Reno, 115 F.3d at 1562.

In his response, Osahar mentions one Bob Aquilino as a former electronic technician on Tour 2 who had Hardy Scales Training and upgraded training on MODDS (DE # 133 at 10, 18, 20). However, Aquilino retired on June 30, 2000, and the training Osahar says he was wrongly not selected for occurred in 2004. Therefore, Aquilino is not a proper comparator.

Osahar also alleges that Oscar Sosa, who worked on the TMS system, was awarded Network Cabling courses; Mike Denis, who was not TMS trained but was RCS trained, was awarded Allen-Bradley PLC

training at a later time when Osahar did not apply; and that J. Fojo, who worked on the TMS system, but was not RCS or PLC trained, was awarded Allen-Bradley training (DE # 133 at 10, 18, 20-21). These persons are not similarly situated based upon their experience or work assignments.

Here, as Osahar has not identified any similarly employees who received more favorable training opportunities, overtime, or more favorable work assignments, he cannot establish a prima facie case of disparate treatment discrimination.

B. Osahar Cannont Establish A Prima Facie Case of Retaliation

It is undisputed that Osahar meets the first prong of the test to establish a prima facie Case of retaliation by engaging in protected activity by filing EEO Complaints. However, as has previously been established, since Osahar cannot establish that he suffered any adverse employment actions after engaging in protected activity, he cannot meet the second prong of the test to establish a prima facie case of retaliation.

Osahar also asserts with respect to his retaliation claim that, In addition to the other "worst work assignments" he received, he was required to attend training and was assigned responsibilities with respect to the Biohazard Detection System, (BDS) (DE # 133 at 12). Initially, as Osahar has not exhausted this claim, which does not appear to have been presented in an EEO complaint or asserted in Osahar's Final Complaint, this Court is without

jurisdiction to consider it. In any event, at least nine other electronic technicians were also trained for BDS including Mike Denis, whom Osahar has listed as a less senior electronic technician not inn the protected class, who was treated more favorably than Osahar. See Pltf's Ex. 286. Therefore, there is no evidence that Osahar's assignment to BDS was an adverse employment action as this assignment did not affect his seniority, job title, pay, overtime or benefits.

C. In Any Event, Defendant Had Legitimate, Non-Discriminatory Reasons For The Acts Complained of and The Record Contains No Evidence That The Proffered Reasons Were Pretexts For Discrimination

In the alternative, if Osahar had established a prima facie case of either disparate treatment or retaliation, Defendant has provided legitimate non-discriminatory reasons for his actions. See Burdine, 450 U.S. at 253.

Defendant did not select Osahar for the Allen-Bradley PLC training (49-04), because there was a need to train a TMS employee with respect to the PLC process and because Osahar had previously received this training in another course (Cole Declaration, ¶28; DE # 78 at Ex. 69. Defendant did not select Osahar for the Network Cabling courses because Supervisor Robert Cole needed an electronics technician who was Tray Management System (TMS) trained for these courses, even though

TMS was not a mandatory prerequisite for these courses. Osahar is not TMS trained and has never volunteered to be TMS trained (Cole Declaration ¶29, Osahar deposition at 248-49). Further, pursuant to Article 38 of the Union Contract, seniority at Osahar's level is not a consideration in the selection of electronics technicians for training (Cole Declarationn, ¶¶31-32).

Defendant makes daily assignments based on the operational needs of the Postal Facility and are within the discretion of management (Cole Declaration ¶¶13-20).

Defendant also had a legitimate non-discriminatory reason for the overtime availability and rotation (Cole Declaration ¶35). Supervisor Robert Cole stated that neither race nor Osahar's prior EEO activity was a factor in Cole's decision not to award Osahar sixth day overtime (Cole Declaration at ¶36). Cole also stated that Osahar has worked sixth day overtime, every quarter, since Cole became Osahar's immediate supervisor in late 2000 (Cole Declaration at ¶48).

Osahar has not applied for any promotions during the time covered by the Complaint (Cole Declaration at ¶47).

All of the above reasons constitute legitimate, non-discriminatory reasons for Defendant's actions, and thus the initial inference of discrimination "drops" from the case. St *Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 510-11 (1993). The burden then shifts back to Osahar to discredit Defendant's proffered explanation for its decision and to show that

Defendant's employment decision was based on retaliation. Burdine, 450 U.S. at 256.

Osahar may avoid summary judgment and show pretext directly by persuading this Court that a discriminatory reason more likely motivated Defendant, or indirectly by showing that Defendant's proffered explanation is unworthy of credence. *Combs v. Planntation Patterns*, 106 F.3d 1519 (11th Cir. 1997), cert. denied, 522 U.S. 1045 (1998). If Defendant's articulated reasons are then found to be a pretext, leaving no valid reason for its actions, it is likely that discrimination was the true reason. See *United States Postal Serv. Bd. v. Aikens*, 460 U.S. 711, 715-16 (1983). Osahar, therefore, has the opportunity to come forward with evidence, including the previously produced evidence put forward to support the prima facie case, which is sufficient to permit a reasonable fact finder to conclude that the reasons given by Defendant were not the real reasons for the failure to select him for training or to give him overtime. *McDonnell Douglas,* 411 U.S. at 804; Combs, 106 F.3d at 1528.

Thus, to show pretext, Osahar is required to come forward with some evidence to persuade this Court to reject Defendant's proffered nondiscriminatory reason. The record, however, is devoid of evidence of discrimination, and Osahar has not proffered any evidence to show pretext. At most Osahar has stated that he believed that the non-discriminatory reasons provided by Defendant were pretexts for discrimination. However, Osahar's mere belief, speculation, or conclusion that he was subject to discrimination does not create an inference of

discrimination or satisfy his burden. *Cortu v. Martinn County Bd. of County Comm'rs*, 47 F.3d at 1074. Although Osahar offers the fact that Mike Denis was subsequently chosen to attend the Allen-Bradley PLC course, and that Mike Denis had previously been trained in the same course as Osahar regarding the Allen-Bradley PLC, this does not establish pretext since there is no evidence that anyone who was not trained on the Allen-Bradley PLC applied for the course; nor is there evidence that there was a need to train a TMS technician at the time Denis was selected.

Thus, because Osahar has not presented significantly probative evidence to meet his burden to establish pretext, he cannot avoid summary judgment. See Young v. General Foods Corp., 840 F. 2d 825, 829 (11th Cir. 1988), cert. denied, 488 U.S. 1004 (1989).

D. Osahar Cannot Establish That He Was Subjected To A Hostile Work Environment

The acts alleged by Osahar in his disparate treatment and retaliation claims are not sufficiently pervasive or severe to alter the conditions of his employment and to create an abusive working environment. To prevail on his hostile environment claims, Osahar must show that the conduct he complains of "altered the condition of the workplace, creating an objective abusive and hostile atmosphere." Edwards v. Wallace Community College, 49 F. 3d 1517, 1521 (11th Cir. 1995). Specifically, Osahar must prove that : 1) he belongs to a protected group; 2) he was subject to

"unwelcome" harassment; 3) the harassment was based on race; 4) the harassment affected a "term, condition, or privilege" of employment in that it "was sufficiently severe and pervasive to alter the condition of his employment and create an abusive working environment", and 5) the employer knew or should have known of the harassment and failed to take prompt remedial action. *Prado v. Luria & Son, Inc.*, 975 F. Supp. 1355 (S.D. Fla. 1997).

Title VII does not address generally offensive or unpleasant conduct. Thevenin v. Baptist Health Systems of South Florida, 931 F. Supp. 856, 859 (S.D. Fla. 1996). Title VII does not provide a cause of action for employees who are exposed to harassment that has no reference to race, sex or national origin. Brown v. Brown and Williamson Tobacco Corp., 1996 WL 325890 at * 3 (N.D. Fla. Apr. 11, 1996), aff'd 111 F. 3d 896 (11th Cir. 1997).

To determine whether Osahar's work environment was hostile or abusive, this Court will consider; 1) the frequency of the alleged discriminatory conduct; 2) the severity of the conduct; 3) whether the conduct was physically threatening or humiliating, or a mere offensive utterance; and 4) whether the conduct unreasonably interfered with Osahar's work performance. Prado, 975 F. Supp. at 1355. Isolated incidents of offensive acts, however, are not sufficient to establish a hostile work environment. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

The acts which Osahar alleges created a hostile work environment are not sufficiently pervasive or severe to create a hostile working environment. For

example, In EEO Complaint 04-24, Osahar complaints that a co-worker was allowed access to lockout cabinets when Osahar was not allowed access, two co-workers blocked/delayed Osahar's access to his assigned task; Osahar's tool box was pushed out of his assigned area, and others created an unwanted appearance in Osahar's work area. These are the kinds of isolated acts which are not sufficiently pervasive of offensive to establish a hostile work environment.

In his response, Osahar relies upo racially offensive comments and symbols which occurred during the period covered by his prior litigation, filed in 1995. Osahar admitted at his deposition that many of the acts, including the most egregious, which he is relying on did not occur during the period covered by the Final Complaint, and some of them appear to be the basis for his recovery in the 1995 lawsuit (Osahar Deposition at 83-84). Thus, those acts are only of limited probative value in determining whether the hostile work environment existed during the time covered by the present Complaint.

Furthermore, in his response Osahar claims that Mike Denis told Rafael Vasquez, a black Postal Service employee, that Vasquez could not go into the IPSS room (DE # at16). However, at his deposition, Osahar admits that he did not witness this conversation and that he has a vague memory that Vasquez told him that Denis told Vasquez not to come into that area (Osahar Deposition at 98). This testimony is hearsay and cannot be considered. See Evans v. McClain of Georgia, Inc., 131 F. 3d at 962

(citing Pritchard v. Southern Co. Services, 92 F.3d 1130, 1135, amended on reh'g, 102 F. 3d 1118 (11th Cir. 1996), cert. denied, 520 U.S. 1274 (1997). Moreover, since Osahar also testified that he did not think that Denis had discriminated against Vasquez (Osahar Deposition at 98), the testimony would have no probative value in any case.

Viewing the evidence as a whole, and considering the work environment within the time period covered by the present Complaint against the backdrop of the totality of circumstances surrounding the prior events, Osahar has failed to adduce sufficient facts to support his claim that the offensive conduct was so pervasive or severe that it "altered the condition of the workplace, creating an objectively abusive and hostile environment." Edwards, supra. At 1521. Therefore, Defendant is entitled to summary judgment as to Osahar's hostile work environment claims.

E. Osahar Has Failed To Exhaust His Administrative Remedies As to His Breach of Settlement Claims

Osahar contends that he has exhausted his administrative remedies because he timely filed inn this Court his Complaint alleging breaches of prior settlement agreements (DE # 133 at 3-5, 6, 21-22). However, as Osahar has failed to exhaust his administrative remedies regarding Defendant's alleged breach of settlement agreements, this Court is without jurisdiction to consider this issue. See Brown v. General Servs. Admin., 425 U.S. 820, 832-33 (1976); Crawford v. Babbitt, 186 F. 3d 1322 (11th Cir. 1999).

The settlement agreements at issue specifically state that in the event of a breach, Osahar must file a written request with the Postal Service either to reinstate the settled complaint for further processing from the point at which processing ceased under the terms of the settlement agreement or to reinstate the counseling process. (DE # 127 at Exs. ## 289-91). Further, the EEOC regulations required Osahar, within 30 days of when he knew or should have known of the alleged noncompliance, to notify the EEO director, in writing, of the alleged noncompliance. 29 C.F.R. 1614.504 (a). The records of the Postal Service reflect that Osahar never contacted the Postal Service EEO office alleging a breach of the settlement Agreements identified in the Final Complaint (DE # 124, January 11, 2006 Declaration of Cynthia N. Gorham). Osahar has not come forward with any evidence to refute this. Osahar's contention that his subsequent EEO Complaints regarding these issues should suffice is without merit since he has never sought to invoke the remedy specified in the settlement agreements, i.e. to re-institute those claims.

As Osahar failed to perform the required acts, he failed to exhaust his administrative remedies for the alleged breaches of settlement agreements. This Court, therefore, has no jurisdiction over those claims.

F. Defendant is Entitled to Summary Judgment On The Claims Osahar Alleges Under 42 U.S.C. 1981 and 1983 and 29 U.S.C. 185

1. Osahar Has Improperly Added His Unfair Representation Claim

Osahar contends in his response that he need not remedies to bring his claim alleging unfair representation by his Union, pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185. However, the undersigned finds that Osahar may not add this claim because it goes beyond the relief Osahar requested in his Final Complaint. See Gilmour v. Gates, McDonald and Co., 382 F.3d 1312, 1314-15 (11th Cir. 2004).

However, even if Osahar may bring this claim, Defendant is entitled to summary judgment because the Union's decision not to take to arbitration Osahar's grievances regarding the denial of training was not so far outside a wide range of reasonableness so as to be irrational. See Airline Pilots Ass'n v. O'Neill, 499 U.S. 65, 67 (1991). This is because Defendant had legitimate, non-discriminatory reasons for not selecting Osahar for the requested training, specifically that: 1) pursuant to the Union Contract, Article 38, seniority at Osahar's level was not a consideration in the selection of electrical technicians for training; 2) Osahar had previously received Allen-Bradley PLC training in another course, and it was necessary for a TMS trained electronic technician who had no prior PLC training to obtain this training; and 3) the supervisor needed an electronic technician for the Network Cabling Training Course who was familiar with TMS; and 4) Osahar was not TMS trained, and had never volunteered for TMS training.

2. There Is No Jurisdiction Over The 42 U.S.C. §§

1981 and 1983 Claims

In his response, Osahar contends that he may bring claims against Defendant under the Fifth and Fourteenth Amendments, pursuant to 42 U.S.C. §§ 1981and 1983. However, this Court lacks jurisdiction over these claims because Defendant is an official of the United States acting in his official capacity, and the United States has not waived sovereign immunity as to this suit. See Global Mail Ltd. v. U.S. Postal Service, 142 F. 3d 208, 210 (4th Cir. 1998). Sovereign immunity also bars a claim against the United States pursuant to the Fifth Amendment. See United States v. Timmons, 672 F. 2d 1373, 1380 (11th Cir. 1982). Furthermore, Osahar may not assert a claim under § 1983, because that section applies only to violations of federal or constitutional rights under the color of state law. See *Albajon v. Gugliotta*, 72 F.Supp.2d 1362, 1369 (S.D. Fla. 1999). Therefore, Osahar's execlusive remedy for his discrimination claims related to his employment is Title VII. See *Brown v. Gen'l Services Admin.*, 425 U.S. 820 (1976).

There, for the foregoing reasons, it is hereby **RECOMMENDED** that Defendant's Motion for Summary judgment (DE # 122, filed 1/17/06), be **GRANTED**, and that Plaintiff's Amended Motion for Summary judgment (DE # 126, filed 1/18/06), be DENIED.

The parties will have ten days from the date of service of this Order within which to file written objections, if any, for consideration by the Honorable

Federico A. Moreno, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal any factual findings contained herein. *LoConte v. Dugger*, 847 F. 2d 745 (11th Cir.), cert. denied, 488 U.S. 958 (1988); RTC v. *Hallmark Builders, Inc.*, 996 F. 2d 1144, 1149 (11th Cir. 1993).

DONE AND SUBMITTED at Miami, Florida, this 21 day of March, 2006.

/s/ ANDREA M SIMONTON
ANDREA M SIMONTON
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Federico A. Moreno,
United States District Judge

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FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 21 2008
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15613

OMAR R. OSAHAR,

Plaintiff-Appellant,

versus

POSTMASTER GENERAL OF U.S. POSTAL SERVICE,

UNITED STATES OF AMERICA,

ATTORNEY GENERAL,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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BEFORE: BIRCH, CARNES and BARKETT, Circuit Judges.

PER CURIAM:

The petition (s) for rehearing filed by the Appellant is DENIED.

ENTERED FOR THE COURT

/S/

UNITED STATES CIRCUIT JUDGE

ORD-41